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ABSTRACT

In 1981, Congress enacted major legislative changes that affect the availability of child care for low-income families. In the name of economic recovery, tax cuts were enacted, social service programs were merged into a block grant, and government benefits for poor families were substantially reduced. This article reviews these statutory changes for their impact on the availability of child care for low-income families and proposes strategies to address the changes. The article is divided into four sections. The first section describes the need for child care for low-income families and the child care arrangements that are available to these families today. The second section describes recent changes in the Internal Revenue Code that affect the availability of child care, focusing on the dependent care tax credit and its usefulness for low-income families. The third section describes the new Social Services Block Grant Program which replaced the social services provisions of Title XX of the Social Security Act. The last section describes changes in the Aid to Families with Dependent Children Program, focusing on the changes in the amount of earned income disregarded in determining eligibility and payment level for child care. The child care provisions of three new work programs are examined: the Work Incentive Demonstration Program, the Community Work Experience Program and the Work Supplementation Program. (Author/RH)

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STRATEGIES TO ADDRESS
THE IMPACT OF THE
ECONOMIC RECOVERY TAX ACT OF 1981
AND THE
OMNIBUS BUDGET RECONCILIATION ACT OF 1981
ON THE
AVAILABILITY OF CHILD CARE
FOR LOW-INCOME FAMILIES

April, 1982

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June H. Zeitlin
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In 1981, Congress enacted major legislative changes that affect the availability of child care for low-income families. In the name of economic recovery, tax cuts were enacted, social service programs were merged into a block grant, and government benefits for poor families were substantially reduced. This article reviews these statutory changes for their impact on the availability of child care for low-income families, and proposes strategies to address the changes.

The article is divided into four sections. The first section describes the vital need for child care for low-income families and the child care arrangements that are available to these families today. The second section describes recent changes in the Internal Revenue Code that affect the availability of child care, focusing on the dependent care tax credit and its usefulness for low-income families. The third section describes the new Social Services Block Grant Program which replaced the social services provisions of Title XX of the Social Security Act. The last section describes changes in the Aid to Families with Dependent Children Program, focusing on the changes in the income disregard for child care expenses and the child care provisions of three new work programs -- the Work Incentive Demonstration Program, the Community Work Experience Program and the Work Supplementation Program.

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In the past low-income families have looked to all three of these federal programs for assistance in meeting their child care needs. Because of extensive cuts in the Aid to Families with Dependent Children ("AFDC") and Title XX social services programs in 1981, however, it is even more important now that families and their advocates look to all of these programs in order to maximize the federal resources available for child care in their communities. For example, for some families the only option available may be the dependent care tax credit because cuts in both the AFDC and Title XX programs have resulted in their family's termination from AFDC and the loss of their Title XX-funded child care. In short, an understanding of all of these federal programs that provide assistance for child care has never been more critical and none should be overlooked in efforts to increase the child care available to low-income families.

I. INTRODUCTION

The composition of the workforce has changed dramatically in the last twenty-five years. Today substantial numbers of women -- married and single, with school-age or even preschool-age children -- are engaged in work outside the home. As women's participation in the paid work force increases, their families' needs for child care similarly increase. Available child care to meet these needs has not increased proportionately, however, especially for low-income families.

A. Need for Child Care

Today approximately 60 percent of all women ages eighteen to sixty-four are in the nation's paid workforce,[1] a nearly 100 percent increase since 1950.[2] A substantial portion of this increase is attributable to the greater numbers of married women working outside the home. Today over half of all married women work in paid employment[3], compared with 40 percent in 1970,[4] and only 24 percent in 1950.[5] The percentage of married women who have children and work in paid employment is even higher. In almost 60 percent of the married couples with children in 1980, both spouses were wage earners.[6]

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[1] Women's Bureau, U.S. Dep't of Labor, Twenty Facts on Women Workers 1 (1980). A substantial proportion of these women work part-time. Over one fourth of the adult women workers in 1979 held part-time jobs. Id.

[2] In 1950, women's labor force participation was 33 percent. Women's Bureau, U.S. Dep't of Labor, Handbook on Women Workers 9-10 (1975) [hereinafter cited as "Women's Bur. Handbook"].

[3] Bureau of Labor Statistics, U.S. Dep't of Labor, Pub. No. 81-522, News 3 (Nov. 15, 1981) [hereinafter cited as "BLS News"].

[4] Bureau of Labor Statistics, U.S. Dep't of Labor, Marital and Family Characteristics of the Labor Force 48 (1979)[hereinafter cited as "BLS Family Characteristics"].

[5] Women's Bur. Handbook, supra note 2, at 17.

The other major portion of the increase in the labor force participation of women can be attributed to dramatic increases in the numbers of women who are single heads of households. Since 1970, the number of women single heads of households has increased by 54 percent.[7] Today, one of every six families is maintained by a woman who is either divorced, separated, widowed or never-married.[8] Among these women, the paid labor force participation rate is higher than among all women generally, about 59 percent,[9] with divorced women more likely than other single mothers to be working or looking for work.[10]

The dramatic increase in the paid workforce participation of women is even more apparent when the participation rates of just mothers, regardless of marital status, are examined.[11] In 1950, only a little over one fifth of all mothers with children under the age of eighteen were working outside the home.[12] By 1981, the percentage of mothers with children under the age of eighteen holding paid jobs had almost tripled, rising to 58 percent.[13] This increase in paid workforce participation is found both among mothers with school-age children and mothers with preschool-age children. Between 1950 and 1978, the participation rate of mothers with children between the ages of six and seventeen increased 82 percent;[14] the rate of mothers with children under the age of six increased by more than 300 percent.[15]

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[6] BLS *News*, *supra* note 3, at 2. The husband was the sole wage earner in only 28.2 percent of two-parent families in 1980. *Id*.

[7] Women's Bureau, U.S. Dep't of Labor, *Facts About Women Heads of Households and Heads of Families* 4 (1979) [hereinafter cited as "Women's Bur. *Facts*"].

[8] BLS *News*, *supra* note 3, at 2.

[9] Women's Bur. *Facts*, *supra* note 7, at 6.

[10] BLS *News*, *supra* note 3, at 1.

[11] For a summary of data on mothers working outside the home and their children, *see* Children's Defense Fund, *Employed Parents and Their Children: A Data Book* (1982) [hereinafter cited as "*Parents and Children*"].

The result of these changes in the work patterns of women is that today more than half of the nation's children have mothers who work away from the home.[16] Even among preschoolers, approximately 45 percent have mothers in the paid labor force.[17]

In the vast majority of families in which mothers work outside the home, they do so for reasons of economic necessity. Twenty-seven percent of married working women have husbands who earn less than $10,000, 51 percent have husbands who earn less than $15,000 and 73 percent have husbands who earn less than

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[12] Cong. Budget Office, *Child Care and Preschool: Options for Federal Support* 44 (1978) [hereinafter cited as "CBO Report"].

[13] BLS *News*, *supra* note 3, at 1.

[14] CBO *Report*, *supra* note 12, at 44.

[15] *Id*.

[16] BLS *News*, *supra* note 3, at 1.

[17] *Id*.

$20,000.[18] One-parent families maintained by women suffer even greater economic hardship. Single-parent, female-headed families have a poverty rate six times that of male-headed (one- and two-parent) families.[19] Among minority families, the poverty rate for single-parent, female-headed families is even higher. More than half of these families live in poverty.[20] Indeed, the National Advisory Council on Economic Opportunity predicts that by the year 2000 the nation's poor will be composed exclusively of women and their children if the proportion of single-parent, female-headed families increases at the same rate as it did between 1967 and 1977.[21]

Women's earnings clearly play a critical role in the economic well-being of their families. Of all wives who worked in 1978, the median contribution their earnings represented was more than one quarter of their family's total income.[22] For those who worked full time, year-round, it was approximately 40 percent.[23] Further, families with more than one wage earner are far less likely to live in poverty. For white families, fewer than 2 percent of multi-earner families in 1978 had incomes below the poverty level, compared with 6 percent of the families with one earner. For Black and Hispanic multi-earner families, about 5.5 percent had incomes below the poverty level, compared to four times that amount for families with only one earner.[24] Among one-parent, female-headed households with children under the age of eighteen more than one quarter had incomes below the poverty level.[25] More than one third of single mothers with children under the age of six who work full time at paid labor are poor.[26]

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[18] BLS Family Characteristics, supra note 4, at A-22.

[19] D. Pearce & H. McAdoo, Women and Children Alone and in Poverty 2 (1981)[hereinafter cited as "Pearce & McAdoo"].

[20] Id. at 3.

[21] Nat'l Advis. Council on Econ. Opportunity, No, Poverty Has Not Disappeared, Soc. Pol'y 25, 28 (Jan./Feb. 1981).

[22] BLS Family Characteristics, supra note 4, at 48.

[23] Id.

The data confirm that in families of all types and income levels, and with children of all ages, mothers are working outside the home in greater numbers than ever before. Moreover, the number of working mothers with children continues to grow. It is estimated that by 1990 there will be 13 million more women in the paid labor force than in 1980, many with young children.[27] By 1990 there will be 23.3 million preschool children, of which 10.4 million (about 44 percent) will have mothers working outside the home.[28]

As women's participation in the labor force grows, their families must look increasingly for outside child care assistance.[29] According to one recent study commissioned by the United States Department of Health, Education and Welfare, "in 1978 almost 52 percent of the country's 24.4 million families with children under 13 [had] a work-related need for some form of day care."[30] Focusing on children, another study estimates that only 54 percent of the children of parents employed full time have identifiable child care arrangements.[31]

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[24] Id. at 49.

[25] Pearce & McAdoo, supra note 19, at 18.

[26] Id. at 6.

[27] Personick, The Outlook for Industry Output and Employment Through 1990, 104 Monthly Labor Rev. 29 (1981).

[28] Id.

B. Availability of Child Care

A diversity of child care arrangements exists today to provide families with the means of caring for their children.[32] The purpose of this section is to describe the different arrangements that are available and their usage by different population groups. It is beyond the scope of this paper, however, to attempt to compare or assess these arrangements.

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[29] The discussion of child care in this paper focuses on the needs of mothers who work outside the home, because the federal programs described here were designed to serve this population. However, this narrow focus is not intended to imply that child care should not also be available to mothers who do not work in the paid labor force.

[30] Abt Associates, Children at the Center: Summary Findings and Their Implications 2 (1979), cited in U.S. Civ. Rights Comm'n, Child Care and Equal Opportunity for Women 13 (1981)[hereinafter cited as "Civil Rights Commission Report"].

[31] Parents and Children, supra note 11, at 8.

[32] Cost and location are the chief factors that parents consider when arranging child care. CBO Report, supra note 12, at 7-8. With respect to cost, working mothers with children under the age of six spend, on the average, between one fifth and one sixth of their earnings on child care. Id. at 7. This ratio appears to hold true at various income levels. Id. at 7-8. With respect to location, two thirds of the parents who travel to a child care provider travel less than 10 minutes. Id. at 8.

In general, when daytime care cannot be provided by a parent of the child, families most often seek out a relative to provide the needed care.[33] Next, families use informal care such as babysitting by non-relatives, or care in a family day care home, most frequently.[34] Finally, families use nursery schools, day care centers, and other more formal arrangements.[35]

Over 40 percent of these families with children under the age of fourteen provide for child care in the child's own home by using either a relative or a non-relative.[36] Another 27 percent use care provided by a relative outside the child's home.[37] Thus over 70 percent of the families using child care rely either on a relative or an in-home arrangement, or both. Minority families, particularly Hispanics, are more likely to rely on care by a relative either in the child's home or in the relative's home[38]; white families are more likely to rely on care by a non-relative in the child's home.[39] Income differences also contribute to selection of in-home care by a relative or a non-relative. Among families with incomes below the poverty level, only about 10 percent use in-home care by a non-relative, as compared with almost 25 percent of those with higher incomes.[40/]

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[33] Id.

[34] Id.

[35] Id.

[36] Id. at 9.

[37] Id.

[38] Id. at 10-12.

[39] Id. at 11.

The remaining 30 percent of households using child care rely on non-relative, non-home-based care.[41/] More than half of these families utilize informal care by non-relatives in other homes, including family day care homes.[42/] Of the remaining families, 3.6 percent use day care centers, and 3.4 percent use other formal child care programs such as nursery or pre-school programs, before/after school programs, or Head Start programs.[43/] Center care is more likely to be used by minority families than white families.[44/] Marital status and family income also affect the selection of center care.[45/] Single, employed mothers are nearly twice as likely to use day care centers and other institutional care than are employed wives.[46/] Families with incomes below the poverty level and families with upper-level incomes were both much more likely than families with moderate incomes to select this mode of care.[47/]

A family day care home is generally one in which an adult

[40/] Id. at 15.

[41/] Id. at 9.

[42/] Id.

[43/] Id. Project Head Start is described infra note 63.

[44/] Id.

[45/] Id. at 15.

[46/] Id. at 12-13.

[47/] Id. This may be due, in part, to the higher cost of center care and to the fact that governmental subsidies targeted on the poor are channeled primarily to day care centers and family day care homes. Id.

cares for six or fewer children,[48] although specific definitions vary on a state-by-state basis. Estimates of the availability of family day care are imprecise. A 1978 study found more than 100,000 licensed family day care homes serving approximately 300,000 children.[49] A later study estimated that 5.2 million children are cared for in licensed and unlicensed family day care.[50]

Day care centers, on the other hand, generally provide care for more children and contain an educational component.[51] There are approximately 18,300 licensed day care centers in the United States serving about 900,000 children.[52] These centers, which are usually licensed by state authorities,[53] are largely concentrated in urban and suburban areas, and generally serve at least twelve children, some of whom attend half a day and others a full day.[54]

Federal programs support all of these child care arrangements, either directly through federal funding of child care programs, or indirectly through tax credits and entitlement program income disregards that may be used to purchase child care

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48/ Id. at 6.

49/ Id. at 6-7.

50/ P. Divine-Hawkins, Family Day Care in the United States, Executive Summary 5 (1981).

51/ CBO Report, supra note 12, at 7.

52/ Id.

53/ Id.

54/ Id.

in a wide variety of settings. The Congressional Research Service estimates that federal expenditures for child care services for 1981 were in excess of $2 billion.[55] The largest single source of federal support for child care was in the form of tax expenditures under the Internal Revenue Code, where the cost of the dependent care credit was estimated at $1,025 million.[56] Another $715 million in federal social services funds was provided to the states to finance child care services under Title XX of the Social Security Act,[57] and approximately $120 million of the earned income of Aid to Families with Dependent Children recipients was spent for child care expenses and disregarded in calculating their eligibility and the amount of their assistance payment in 1979, the latest year for which figures are available.[58] Another $270 million was expended under the federal Child Care Food Program, which subsidizes the purchase of food served in day care centers and family day care homes.[59] In addition, $820 million was provided to fund comprehensive child development centers under Project Head Start, which serves low-income children.[60]

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[55] M. Malone, Cong. Research Serv., Issue Brief No. 1 B 81027, *Child Day Care: The Federal Role* 1 (Dec. 29, 1981)[hereinafter cited as "Malone"].

[56] *Id*. at 2.

[57] Malone, *supra* note 55, at 1.

[58] Malone, *supra* note 55, at 1.

[59] *Id*. at 2. Funding for the Child Care Food Program was reduced by approximately $114.1 million for Fiscal Year 1982 as a result of several program cuts made by the Omnibus Budget Reconciliation Act of 1981. *See* Malone, *supra* note 55, at 6. These program cuts included:

- limiting participation to children age fourteen or younger; previously children up to the age of

(continued)

The following sections describe the major statutory changes made by the Omnibus Budget Reconciliation Act of 1981[61] and the Economic Recovery Tax Act of 1981[62] that affect the availability of child care for low-income families, as well as strategies that may be employed to address these changes.

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eighteen could participate;

- reducing reimbursement for administrative costs overall by 10 percent;
- reducing the number of meals funded to two meals and one snack per child, per day; previously three meals and two snacks per child, per day, were funded.

See Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, §810, 95 Stat. 357. For Fiscal Year 1983 the Reagan Administration has proposed a Child Nutrition Block Grant, which would combine the School Breakfast Program and Child Care Food Program, and cut the funding for these programs from $735 million to $488 million. *See* Office of the Pres., Office of Management & Budget, *Budget of the United States Government, Fiscal Year 1983* 5-155 (1982)[hereinafter cited as "President's 1983 Budget"]. *See also* Children's Defense Fund, *An Analysis of the President's Budget and Children* 97 (1982)[hereinafter cited as "CDF *Budget Analysis*"].

[60] Malone, *supra* note 55, at 2. Project Head Start offers educational, nutritional, medical and social services to low-income children. It is not discussed further in this paper because no program changes were made in it by the Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, 95 Stat. 357. Indeed, funding was increased for the program to $950 million for Fiscal Year 1982, $1,007,000,000 for Fiscal Year 1983 and $1,058,357,000 for Fiscal Year 1984. *See* Malone, *supra* note 55, at 5. The appropriation for Fiscal Year 1982, however, provided only $912 million for the program. *See* Pub. L. 95-51, 95 Stat. 958 (1981).

[61] Pub. L. 97-35, 95 Stat. 357 (1981).

[62] Pub. L. 97-34, 95 Stat. 172 (1981).

II. TAX CREDIT FOR DEPENDENT CARE EXPENDITURES

A. Introduction

A tax credit reduces, dollar for dollar, the amount of the taxpayer's income tax liability. As a result, it is generally more beneficial to the taxpayer than a tax deduction, which merely reduces the amount of the taxpayer's taxable income. However, if the taxpayer does not have a tax liability against which the credit may be applied, its benefit to the taxpayer is lost unless, by law, the credit is refundable. Under a refundable credit, that part of the credit that exceeds the taxpayer's tax liability is refunded to the taxpayer.

Since 1976 federal income tax policy has subsidized child care for individual taxpayers through the dependent care credit, which is not refundable.[63] Indeed, this credit and one other tax subsidy were the only federal support mechanisms for child care that were expanded during the 97th Congress.

The Economic Recovery Tax Act of 1981 expanded the federal tax subsidies for child care as of January 1, 1982 in three ways. First, the amount of the dependent care tax credit was increased.[64] Second, the amount of the tax credit was made to vary with income so as to target greater assistance to low- and moderate-income families.[65] Third, child care services paid for by employers were authorized to be treated by their employees as a tax-free benefit, provided the services are rendered under a program meeting specified guidelines.[66] These statutory changes and their impact on low-income families are discussed below.

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[63] See I.R.C. §44A, as amended by Economic Recovery Tax Act of 1981, Pub. L. 97-34, §124, 95 Stat. 172. In addition, employers may deduct the cost of employer-provided child care as an "ordinary and necessary business expense." I.R.C. §162.

[64] Economic Recovery Tax Act of 1981, Pub. L. 97-34, §124(b), 95 Stat. 172 (to be codified in I.R.C. §44A(d)).

B. Statutory Changes

1. Amount of dependent care credit

Since 1976, a dependent care tax credit has been available to households that incur employment-related child care expenses.[67] At that time, the amount of the credit was fixed at 20 percent of up to $2,000 in dependent care expenses for one child, for a maximum credit of $400.[68] The amount of the credit for two or more children was set at 20 percent of up to $4,000 in expenses, for a maximum credit of $800.[69]

The Reagan Administration did not include an expansion of this dependent care credit as part of its 1981 tax package.[70] Rather the statutory changes in the tax credit last year were the result of efforts by several members of Congress to successfully amend the Administration's tax bill.[71]

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[65] Id. §124(a) (to be codified in I.R.C. §§44A(a)).

[66] Id. §124(e) (to be codified in I.R.C. §129).

[67] Tax Reform Act of 1976, Pub. L. 94-455, §504, 90 Stat. 1520 (codified in I.R.C. §44A (1976)).

[68] Id. §504 (codified in I.R.C. §§44A(a),(d) (1976)).

[69] Id.

[70] See Malone, supra note 55, at 10.

As a result of these amendments, the dependent care tax credit was expanded in two ways. First, the ceilings for allowable dependent care expenses were raised from $2000 to $2,400 for one child and from $4000 to $4,800 for two or more children.[72] Congressional supporters justified the increase in allowable expenses as necessary to make up for the effect of inflation on child care costs since 1976.[73]

The second and more far-reaching change in the dependent care credit was the establishment of a sliding scale based on family income for determining the amount of the credit. Under this scale, a family whose adjusted gross income[74] is $10,000 or less is entitled to a credit of 30 percent of all allowable dependent care expenses up to the ceiling amount. The credit is thereafter reduced by one percentage point for every $2,000 or fraction thereof by which family income exceeds $10,000, with a minimum credit set at 20 percent.[75] The following chart illustrates the new tax credit scale:

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[71] Recognizing that a majority of American families now identify child care as an area in which government policies must be more responsive, Senator Metzenbaum offered amendments to the tax bill on the Senate floor to expand the dependent care credit. See 127 Cong. Rec. S7595 (daily ed. July 14, 1981). These amendments were co-sponsored by Senators Hawkins, Durenberger, Packwood, Cranston, D'Amato, Moynihan, Tsongas, Williams, Kennedy, Randolph, Simpson, Levin and Riegle. Id. A similar proposal had been introduced in the House of Representatives earlier by Representative Barber Conable. See id. at E517-19 (daily ed. Feb. 18, 1981).

[72] Economic Recovery Tax Act of 1981, Pub. L. 97-34, §124(b), 95 Stat. 172 (to be codified in I.R.C. §44A(d)).

[73] See 127 Cong. Rec. S7601 (daily ed. July 14, 1981) (remarks of Sen. Metzenbaum).

[74] Adjusted gross income is defined as all income not specifically exempt from tax by law, less allowable deductions such as business expenses and alimony payments. I.R.C. §62.

Family Adjusted Gross Income	Percent of Employment-Related Dependent Care Expenses Permitted as Credit
up to $10,000	30%
$10,001 to $12,000	29%
$12,001 to $14,000	28%
$14,001 to $16,000	27%
$16,001 to $18,000	26%
$18,001 to $20,000	25%
$20,001 to $22,000	24%
$22,001 to $24,000	23%
$24,001 to $26,000	22%
$26,001 to $28,000	21%
$28,001 and above	20%

Taken together, the change in the expense ceilings and the sliding scale for determining the amount of the credit increase from $400 to $720 the maximum amount of the credit for a family with $10,000 or less in adjusted gross income and $2,400 in dependent care expenses for one child. For families with $28,000 or more in adjusted gross income and $2,400 in expenses for one child, the credit would increase to $480. Thus, for the first time families with incomes at the lower end of the economic ladder are entitled to a proportionately larger benefit than families with higher incomes.

2. Eligibility for dependent care credit

To qualify for the dependent care credit the taxpayer must meet several general requirements. First, the taxpayer must maintain a home for himself or herself and one or more qualifying individuals.[76] A qualifying individual is the person for whom care is provided, in this case, a dependent child.[77] Second, the taxpayer must have earned income during the tax year.[78] Third and most importantly, expenses incurred for child care must be employment-related.[79]

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[75] Economic Recovery Tax Act, Pub. L. 97-34, §124(a), 95 Stat. 172, (to be codified in I.R.C. §44A(a)(2)).

The tax code specifically links the dependent care credit to employment. Expenditures must be incurred while the taxpayer is gainfully employed, including self-employment, or is in active search of gainful employment.[80] Expenditures are deemed employment-related if they meet two tests. First, they must enable the taxpayer to be gainfully employed or to look for gainful employment.[81] Second, they must be expenses for the care of, or household expenses attributable in part to the care of, one or more qualifying individuals.[82] The primary purpose of expenses paid for the care of a qualifying individual must be to assure the qualifying individual's well-being and protection.[83] Thus, amounts paid to provide a child with food, clothing or education are generally not deemed expenses paid for the care of a qualifying individual.[84] Similarly, the costs of transporting the child between the taxpayer's home and the place where care is provided are not considered expenses for the careof a qualifying individual.[85]

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[76] 26 C.F.R. §1.44A-1(a)(2) (1981); Internal Rev. Serv., Pub. No. 503, Child And Disabled Dependent Care 1 (Nov. 1981) [hereinafter cited as "IRS Child Care"].

[77] A qualifying individual may be a dependent child under the age of 15 and for whom the taxpayer is entitled to a deduction under I.R.C. §151(e), a physically or mentally disabled spouse, or any other dependent who is physically or mentally incapable of caring for himself or herself. I.R.C. §44A(c)(1). For tax purposes, a dependent is defined as a descendant, i.e., daughter, granddaughter, etc.; a stepson or stepdaughter; a sibling; a stepbrother or a stepsister; a parent; an ancester; a stepparent; a niece or a nephew; an aunt or uncle; in-laws, or any individual who, for the taxable year, has as his or her principal place of abode the home of the taxpayer and is a member of the taxpayer's household. Id. §152.

[78] I.R.C. §44A(e).

[79] I.R.C. §44A(c)(2)(A); 26 C.F.R. §1.44A-1(c)(1)(1981).

[80] 26 C.F.R. §1.44A-1(c)(1)(i)(1981). Volunteer work for a nominal salary does not constitute gainful employment. Id. An expense is not considered to be employment-related merely because it is incurred while the taxpayer is gainfully employed; the purpose of the expense must be to enable the taxpayer to be gainfully employed. Id.

In addition to the above requirements, the tax code places two limitations on the amount of the credit. The first, which has already been discussed, is the limitation on the amount of dependent care expenses that may be considered in calculating the credit. The second is the earned income limitation on the amount of expenses that may be considered in calculating the credit.[86] Under the latter limitation, the amount of dependent care expenses may not exceed the taxpayer's earned income for the taxable year.[87]

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[81] 26 C.F.R. §1.44A-1(c)(1)(i)(1981).

[82] Id. §1.44A-1(c)(1)(i) & (2). Thus, amounts paid for the services of a domestic maid or cook are considered to be appropriate expenses if a part of these services is provided to the qualifying individual. Id. §1.44A-1(c)(2).

[83] Id. §1.44A-1(c)(3)(i).

[84] Id. However, when the manner of providing care is such that the expense which is incurred includes expenses for other benefits which are "incident to and inseparably a part of the care," the full amount of the expense is considered to be incurred for care. Thus, the full amount paid to a nursery school or day care center in which a qualifying child is enrolled is considered as being for the care of the child, even though the school furnishes lunch and educational services. Expenses incurred for a child in the first grade or higher, however, are not deemed to be for the care of the qualifying individual. Id.

[85] Id.

Finally, the taxpayer must meet two filing requirements.

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[86] Earned income is defined as wages, salaries, tips, other employee compensation and net earnings from self-employment. See Id. §1.44A-2(b)(2). This definition raises the question whether recipients of Aid to Families with Dependent Children benefits participating in the new Community Work Experience Program, see discussion infra Section IV, will be able to take advantage of the dependent care credit because of the latter statute's provision that "[n]othing in this section shall be construed as authorizing the payment of aid under this part as compensation for work performed, nor shall a participant be entitled to a salary or to any other work or training expense provided under any other provision of law by reason of his participation in a program under this Section." Omnibus Budget Reconciliation Act, Pub. L. 97-35, §2307, 95 Stat. 835. This provision seems to say simply that it cannot be read to convert into "compensation for work performed" monies that would not otherwise be considered to be such compensation. Whether the Internal Revenue Service will consider the monies paid to participants in this program to be within the definition of earned income under the Internal Revenue Code remains to be seen, however. In any event, recipients of Aid to Families with Dependent Children benefits participating in the new Work Supplementation Program, see discussion infra Section IV, should clearly not be barred from eligibility for the dependent care credit because that statute specifically provides that "wages paid...shall be considered to be earned income for purposes of any provision of law." Id. at §2308.

[87] I.R.C. §44A(e)(1)(A). In the case of a married taxpayer, the amount of expenses may not exceed the earned income for the taxable year of the lesser-earning spouse. Id. §44A(e)(1)(B). However, if the spouse of a taxpayer is a student or is incapable of caring for himself or herself, for purposes of the earned income limitation the spouse is deemed to be gainfully employed and to have earned income of not less than $200 if there is only one qualifying individual, or $400 if there is more than one qualifying individual, for each month the spouse continues to be a student or incapacitated. Id. §44A(e)(2), as amended by Economic Recovery Tax Act of 1981, Pub. L. 97-34, §124(b), 95 Stat. 172. These figures represent a slight increase over provisions in the prior law.

First, the taxpayer can only take advantage of the dependent care credit by filing the long income tax form (Form 1040).[88] The long form must be accompanied by a separate schedule (Schedule 2441) or a written statement containing the names of the qualifying individuals, care providers and other information required by the Internal Revenue Service.[89] Second, married couples must file a joint income tax return.[90]

3. Types of care allowable

Before passage of the Economic Recovery Tax Act of 1981, the only limitation imposed on the kind of child care expenses that would qualify for the dependent care credit was that the credit was not available for payments to anyone who was a dependent of the taxpayer or a child of the taxpayer under the age of 19.[91] This limitation continues to apply. There are no new limitations on expenses for child care that is provided in the taxpayer's household.

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[88] IRS *Child Care*, *supra* note 76, at 1.

[89] *Id*. at 3. For further discussion of this filing requirement *see* Subsection C-2 *infra*.

[90] I.R.C. §44A(f)(2); IRS *Child Care*, *supra* note 76, at 1. The rules governing marital status for the dependent care credit are similar in most respects to the general provisions governing marital status for tax purposes set out at I.R.C. §143. Marital status is determined as of the last day of the taxable year. I.R.C. §143(a)(i). An individual who is legally separated from his or her spouse under a decree of divorce or of separate maintenance is not considered married under the Code. *Id*. §143(a)(2) & §44A(f)(2). In addition, an individual who is not legally separated from his or her spouse but whose spouse is absent from the household during the entire taxable year is considered not married if the individual furnishes over half the cost of maintaining a household during the taxable year and the household constitutes the principal place of abode of a qualifying individual for more than one-half of the taxable year. *Id.* §143(b). For purposes of the dependent care credit, the spouse need only be absent from the household for the last six months of the taxable year. *Id*. §44A(f)(4).

For expenses attributable to care provided outside the taxpayer's household, however, the Economic Recovery Tax Act of 1981 limited the use of the tax credit when care is provided by certain facilities, "dependent care centers." A dependent care center is defined for tax purposes as any facility that provides care for more than six individuals (other than individuals who reside at the facility) and receives a fee, payment or grant for providing such care.[92] The new tax act requires that these centers comply with all applicable state and local laws.[93] Thus, any child care center that serves more than six children must meet applicable state and local laws in order for expenses incurred for care at that center to qualify for the dependent care credit.[94]

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[91] Id. §44A(f)(6).

[92] Economic Recovery Tax Act of 1981, Pub. L. 97-34, §124(d), 95 Stat. 172 (to be codified in I.R.C. §44A(c)(2)(C)).

[93] Id. This provision is similar to a provision contained in the Omnibus Budget Reconciliation Act of 1981 requiring child care centers receiving federal funds under the newly created Social Services Block Grant Program to comply with all applicable state and local laws. See Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, §2352, 95 Stat. 357, and discussion infra Section III.

[94] This provision apparently would cover group day care homes, including family day care homes, that serve more than six children.

4. Dependent care assistance programs

Another provision of the Economic Recovery Tax Act of 1981 establishes a new category of tax-free employees' benefits, those that are provided under "dependent care assistance programs."[95] Benefits under these new programs join more traditional non-taxable benefits such as those provided under employer-furnished medical, dental or life insurance programs. Prior to the passage of the 1981 tax act there had been considerable confusion surrounding the tax status of child care benefits paid or made available to an employee by an employer.[96]

The Act specifically allows employers to establish a "dependent care assistance program" under which child care benefits paid or made available to an employee by an employer are expressly excluded from the gross income of the employee.[97] To qualify for treatment as non-taxable benefits, the employer, among other things, must develop a separate, written plan for such a program that is non-discriminatory, and must provide employees with reasonable notification of the availability and terms of the program.[98] As with the dependent care tax credit, the amount of the benefits that are excluded from income may not exceed the employee's earned income for the tax year.[99]

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[95] Economic Recovery Tax Act of 1981, Pub. L. 97-34, §124e, 95 Stat. 172 (to be codified in I.R.C. §129).

[96] See Bay Area Child Care Law Proj., Tax Free Child Care Employee Benefit Possible 1 (Sept. 18, 1981).

[97] Economic Recovery Tax Act of 1981, Pub. L. 97-34, §124e, 95 Stat. 172 (to be codified in I.R.C. §129). At the time this was written, no regulations had been issued implementing these provisions, but under the terms of the statute, employers should be able to offer a dependent care assistance program in which they provide child care directly or in which they pay others to provide this care. The regulations under the analagous Employer's Educational Assistance Program, I.R.C. §127, may be helpful in interpreting the statutory provisions on the dependent care assistance program. See 26 C.F.R. §1.162-10 (1981).

C. Stategies for Use of the Dependent Care Tax Credit

In past years, the primary beneficiaries of the dependent care tax credit have been middle- and upper-income families. For example, in 1977, 43 percent of child care tax credit claims were made by families with incomes over $20,000.[100] Another 43 percent of all claims were made by families with incomes between $10,000 and $20,000, and only 14 percent of claims were made by families with incomes below $10,000.[101] By 1979, the latest year for which data are available, the number of families taking the credit with incomes greater than $20,000 had risen to over 62 percent, while the number of low-income families taking the credit declined.[102] Ninety-three percent of all claims were made by families with incomes greater than $10,000 and less than

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[98] Economic Recovery Tax Act of 1981, Pub. L. 97-34, §124(e), 95 Stat. 172 (to be codified in I.R.C. §129).

[99] Id.

[100] Senate Committee On the Budget, 95th Cong., 2nd Sess., Tax Expenditures: Relationship To Spending Programs And Background Material On Individual Provisions 286 (1978).

[101] Id.

[102] See Internal Rev. Serv., Statistics of Income Bulletin, 1979, Table A (Jan. 5, 1981)[hereinafter cited as "IRS Statistics 1979"].

7 percent were made by families with incomes below $10,000.[103]

The changes in the child care credit incorporated into the Economic Recovery Tax Act of 1981 were designed, in part, to remedy this unequal distribution of its benefits. During debate on the proposed amendment on the Senate floor, for example, Senator Durenberger noted:

> Although the present tax credit has been effective as far as it goes, its impact has been focused on a relatively limited segment of the population. . . . In order for the tax credit to provide more benefits for those who cannot afford dependent care, the credit would have to be adjusted to provide lower budget families with increased benefits and slide those benefits down to the current business credit level as the families' incomes rise. This amendment would do just that.[104]

Congressional proponents of the tax credit approach claimed that use of the tax credit to provide assistance for working families in need of affordable child care has several advantages over other forms of government aid. Representative Conable, in introducing his version of a child care tax credit proposal in the House of Representatives, described the advantages of this approach: Because a tax credit is available equally for child care in or out of the home, for babysitters, relatives, church-sponsored care, or virtually any other arrangements that might be made, and the money is provided directly to parents rather than to providers, parents may choose the kind of care most appropriate to their families' needs.[105] For similar reasons, the child care delivery system is not skewed to any particular alternative,[106] and use of the tax credit does not encourage the development of bureaucracies.[107]

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[103] Id.

[104] 127 Cong. Rec. S8446 (daily ed. July 24, 1981).

At the same time, other congressional supporters noted that the tax credit approach has some limitations of particular relevance to low- and moderate-income families. Senator Cranston, for example, pointed out that the receipt of a tax credit once a year in April does little to aid families facing weekly and monthly child care costs; it also does little to resolve the shortage of affordable child care options.[108]

Another limitation is that the credit is non-refundable, and therefore, is only beneficial to the extent the taxpayer has a tax liability against which to offset it. Thus, as noted by Senator Heinz, low-income families who have little or no tax liability will find that the tax credit is relatively meaningless.[109] For example, families that have earnings of approximately $5,000, after taking the standard deduction and personal exemptions, may have very little taxable income on which to calculate their tax liability. Because taxable income consists of gross income less lawful exclusions, exemptions and certain deductions, it is likely to be substantially less than the family's total income. Income tax liability is not incurred until taxable income exceeds $3,400 in the case of a return filed jointly and $2,300 for a return filed by an individual.[110] As a result, many working poor families pay little or no tax on their earned income after allowable exemptions and exclusions are considered, and therefore may be precluded from realizing any gain from a credit that is not refundable.

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[105] Id. E517 (daily ed. Feb. 18, 1981).

[106] Id.

[107] Id.

[108] Id. S8450 (daily ed. July 24, 1981).

[109] Id. S8579 (daily ed. July 28, 1981).

One other point to note concerning low-income families with tax liability is that a family with an income of less than $10,000 can receive the maximum credit of $720 for one child or $1,440 for two or more children only if it incurs child care costs of $2,400 and $4,800 respectively, amounts which would be prohibitive in view of family income. In 1979, for example, the average dependent care credit claimed for families with incomes below $10,000 was $165, reflecting a total family dependent care expenditure of $825.[111]

Despite these drawbacks, the newly-expanded dependent care tax credit will be more beneficial to some low-income families than its predecessor. While it may be neither the most beneficial nor the most efficient means of subsidizing child care for low-income families, it is one of the few benefits provided by law that has been expanded. The following discussion explains how the credit can be utilized to the maximum by low-income families, and proposes strategies for additional reforms to further increase its use.

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[110] See Economic Recovery Tax Act of 1981, Pub. L. 97-34, §§101(a),(b),(c), 95 Stat. 172.

[111] See IRS Statistics 1979, supra note 102, Table A.

1. Maximizing the benefit of the dependent care credit

The first step is the obvious one of ensuring that the dependent care tax credit is used by all eligible low-income families to reduce or eliminate their tax liability. The following example illustrates the benefit of the dependent care credit to a taxpayer filing as a single head of household.

> Joan Smith is divorced and has two preschool-age children. She earns $7,600 as a receptionist. Her taxable income, assuming no deductions and three personal exemptions, would be $4,600. Using the revised tax tables for 1982, shewould have a tax liability of $300.[112]
>
> During the year, Joan pays $1,200 to a local day care center to care for her two children while she is at work. Because Joan's income is less than $10,000, she is entitled to a 30 percent credit for all allowable child care expenditures up to the ceiling amount of $4,800 for two or more children. Joan's dependent care credit is thus 30 percent of $1,200 or $360.
>
> Joan is therefore entitled to reduce her tax liability dollar-for-dollar by the amount of her child care credit. Since the credit to which she is entitled is greater than her tax liability, she will pay no federal income tax. However, sixty dollars of her child care credit, the amount which exceeds her tax liability, is lost.

A second step is to ensure that the impact of the credit for low-income families is maximized by taking, whenever possible, the dependent care credit in conjunction with the Earned Income

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[112] See Economic Recovery Tax Act of 1981, Pub. L. 97-34, §101(b)(I), 95 Stat. 172 (to be codified in I.R.C. §1(b)).

Tax Credit ("EITC").[113] The EITC currently provides tax relief to families with children and an earned income of less than $10,000.[114] Enacted in 1975, the EITC was intended to provide relief to low-income families who pay little or nothing in income tax. It was designed as a bonus or work-incentive that would reduce welfare dependency.[115]

The EITC is a refundable credit of 10 percent of the first $5,000 of earned income, for a maximum credit of $500.[116] The amount of the credit for any taxable year may not exceed $500, less any amount equal to 12.5 percent of the adjusted gross income (or, if greater, the earned income) that exceeds

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[113] Taxpayers may reduce their withholding allowance by taking extra exemptions and thereby increase their take home pay if they expect to take the earned income credit or the dependent care credit. See I.R.S. Form W-4. However, a taxpayer cannot take an extra exemption for the earned income credit if he or she is receiving advance payment of it. Id. See note 122 infra and accompanying text. Whether any particular low-income taxpayer should opt to take either of these credits in advance depends upon how accurately his or her projected tax liability can be predicted. Thus, the burden of facing a big tax bill at the end of the year may be greater than the benefit of receiving more money each pay period. See also infra pp. 31-33, for a discussion of the special concerns for recipients of Aid to Families with Dependent Children benefits.

[114] I.R.C. §43. To be eligible for the EITC, a taxpayer must be married with a dependent child, be a surviving spouse, or qualify as a head of household. Id. §43(c)(1)(A). To qualify as a head of household the taxpayer must provide over half of the support of a dependent in the household. Id. §143(b). I.R.S. has determined that benefits under the Aid to Families with Dependent Children Program may not be counted in determining whether a taxpayer provides over half of the support of a dependent. See I.R.S. Pub. 844 (Rev. 1-79).

[115] S. Rep. No. 94-36, 94th Cong., 1st Sess. 11 (1975), reprinted in 1975 U.S. Code Cong. & Ad. News 63.

[116] I.R.C. §43(a).

$6,000.[117]

The benefit of the EITC can be illustrated by the following example. Again, assume our taxpayer, Joan Smith, has earned income of $7,600.

Basic credit (10% of the first $5,000 of earned income)	$ 500
Base Figure (Adjusted Gross Income, or if greater, earned income)	$7,600
Excess over $6,000 ($7,600 minus $6,000)	$1,600
12.5% of excess over $6,000 (12.5% x $1,600)	$ 200
Amount of credit ($500 minus $200, which is 12.5% of excess over $6,000)	$ 300

In the above example, Joan Smith's EITC of $300 equals her tax liability. Thus, if she only claims the EITC, she simply pays no federal income taxes. Had she filed for the dependent care tax credit in addition to the EITC, however, she not only would have cancelled her tax liability with the dependent care credit, but would have received a refund in the full amount of the EITC as well.

This result is dictated by tax law provisions governing the ordering of credits with the dependent care credit.[118] The statute specifically lists other credits that must be taken before the dependent care credit.[119] The EITC is not included in this list and therefore is taken subsequent to the dependent care credit. Moreover, on the tax form itself the dependent care credit is placed ahead of the EITC, making the EITC the last calculation.[120] Thus, using our example, Joan Smith would first calculate her tax liability of $300 and then subtract her child care credit of $360, resulting in zero tax liability. Her final step would be to calculate her earned income tax credit of $300, which she would then receive in full as a refund. The following chart illustrates the effect of the dependent care credit and the EITC on tax liability and the amount of the EITC refund.

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[117] *Id*. §43(b).

[118] *Id*. §44A(b).

[119] *Id*.

TAX LIABILITY	DEPENDENT CARE CREDIT	EITC	REFUND
$300	$ 0	$300	$ 0
$300	$360	$300	$300

Therefore, although the dependent care credit itself is not refundable, taken in conjunction with the EITC it may be used to offset or decrease any tax liability incurred and thereby increase the absolute dollar amount of the earned income tax credit refund received by low-income families. As illustrated by the above example, the amount of the earned income tax credit itself is unchanged. But the amount that is refunded to the taxpayer is changed because his or her tax liability has been offset by the use of the dependent care credit.

For recipients of Aid to Families with Dependent Children benefits, the dollar amount of the earned income tax credit is included as earned income both for calculating AFDC eligibility and in determining the level of payments. Formerly the credited amount was not counted as income to a recipient until it was actually received, or applied to offset the recipient's tax liability.[121/] However, newly enacted amendments to the Social Security Act contained in the Omnibus Budget Reconciliation Act of 1981 provide that the dollar amount of any advance payments of the EITC for which the recipient is eligible,[122/] whether or not the recipient has elected to receive advance payments or is actually receiving them, must be counted as earned income.[123/]

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[120] *See* I.R.S. Form 1040.

Thus, it is especially important, first, that AFDC recipients eligible for the EITC actually receive the EITC. Second, it is important that AFDC recipients receive the full benefit of the EITC by claiming it with the dependent care credit, thereby increasing the amount of the actual EITC refund, since the full amount of the EITC will be counted as income for AFDC purposes in any event. Third, because any amount received through the EITC, either as an advance payment or a refund, is considered earned income subject to the disregard of $30 plus 1/3 of the remainder for the first four months of a recipient's

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[121/] 42 U.S.C. §602(d)(1)(Cum. Supp. 1975-80).

[122/] A taxpayer may elect to receive the EITC through an advance payment by authorizing her or her employer to make an additional payment equal to the amount of the employee's earned income credit, based on the employee's wages and in accordance with tables prescribed by the Secretary. I.R.C. §3507. See also I.R.S. Form W-5.

[123/] Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, §2305, 95 Stat. 357.

employment,[124] the EITC is worth even more than its "face value" for at least a short period of time and for this reason, too, should be claimed in full by the recipient.

A final area to consider in developing strategies to maximize the benefit of the dependent care credit is the relationship of the federal dependent care credit to similar state or local income tax provisions, if any. A decrease in federal tax liability resulting from use of the credit may not necessarily be accompanied by a decrease in local tax liability either because local statutes contain no provisions that recognize child care costs as a basis for decreasing local tax liability, or contain provisions that are not as favorable as the federal provisions.[125] Moreover, states that had enacted provisions parallel to the 1976 federal provisions may not have amended their provisions to take account of the 1981 federal changes. On the other hand, state income tax provisions may be more favorable than the federal provisions, for example, by specifying that the child care credit is refundable.[126]

Advocacy efforts need to be made at the local level that will ensure, at the least, parallel treatment of child care costs by local and federal taxing authorities to ensure that low-income taxpayers receive the full benefit of the federal provisions. Indeed, it may be possible to obtain through the local tax structure even greater recognition of child care costs than has occurred at the federal level.

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[124] See 42 U.S.C. §602(a)(8)(Cum. Supp. 1975-80), as amended by Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, §2301, 95 Stat. 357.

[125] For example, California permits a credit of 3 percent of employment-related child care expenses and limits the availability of the credit to taxpayers with adjusted gross incomes of less than $20,000. See Calif. Revenue & Taxation Code §17052.6.

[126] Minnesota, for example, has a refundable credit. See 1978 Minn. Stats. §290.067, Subd. 3.

In sum, the 1981 changes in the dependent care credit were intended to benefit lower-income families. If these families can take advantage of the dependent care credit, they may pay less in taxes or be able to collect a larger portion of their earned income tax credit refund. Although the benefits of the tax credit alone can neither buy quality child care nor make up for other lost benefits, the credit is a mechanism for using federal funds to subsidize the child care costs of low-income taxpayers.

Public education efforts are needed to inform low-income families of the dependent care tax credit. Flyers or pamphlets setting out who is eligible for the dependent care credit, how to claim the credit on the tax form, the relationship of the credit to the EITC as well as to local income taxes, and the special effects of taking the credit for AFDC applicants and recipients could be effective aids. Such materials could be distributed at welfare centers, churches, supermarkets or other neighborhood centers.

2. Improving filing procedures for the dependent care credit

In order for low-income families to take maximum advantage of the dependent care credit, an awareness of the proper filing procedures for claiming the credit is necessary. In addition, advocacy efforts are needed to simplify these procedures.

Currently, families wishing to take advantage of the dependent care credit must file a regular 1040 tax form and attach a Schedule 2441 on dependent care expenses.[127/] Unlike the earned income tax credit, the dependent care credit cannot be taken on form 1040A, the short form. The regular 1040 tax form, in addition to being more complex, is generally filed only by higher-income taxpayers who itemize deductions. For example, in 1979, 69 percent of the 1040 tax returns were filed by taxpayers with incomes greater than $20,000.[128/] Only 6 percent were filed by taxpayers with incomes below $10,000.[129/] The short form 1040A, on the other hand, is used primarily by families with lower incomes. In 1980, there were 37,631,849 form 1040As filed for the 1979 tax year.[130/] Of these, nearly 70% were filed by taxpayers with incomes below $10,000.[131/] Thus, most low-income taxpayers, by virtue of using the short form alone, are unable to take advantage of the child care credit.

Two steps could be taken to make the child care credit more accessible to low-income families. One is an education effort to inform taxpayers not only of the dollar value of the dependent

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[127/] IRS *Child Care*, *supra* note 76, at 1.

[128/] *See* Internal Rev. Serv., *Statistics of Income Bulletin*, Table 3 (Summer 1979).

[129/] *Id.*

[130/] *See* Internal Rev. Serv., *Statistics of Income Bulletin*, Table 11 (May 13, 1981).

[131/] *Id.*

care credit but also of the need to file the regular 1040 tax return. In addition, a concerted effort should be undertaken to persuade the Internal Revenue Service to add the dependent care credit to the short form.

Decisions regarding the content and appropriateness of all tax forms are made on an annual basis by the Tax Forms Coordinating Committee, an internal, policy-making body of the Internal Revenue Service. The Committee reviews such factors as the number of persons who file the various forms and take various deductions, exemptions and credits, and the costs incurred in processing the forms. The review process begins in the early spring of the tax year involved, and notice of hearings for the purpose of soliciting public comment is published in the Federal Register.132/ In addition to testimony, the Committee reviews written public comments.133/

Congress, in adopting changes in the dependent care credit, made it clear that it wished greater benefits to go to lower-income taxpayers. Yet, these families overwhelmingly utilize the short income tax form. Therefore, the short form should be amended to include the dependent care credit, in order to carry out the intent of Congress.

As a first step, advocates interested in offering comments or suggestions on the contents of the short income tax form for 1982 should address them to:

132/ See, e.g., 47 Fed. Reg. 15204 (1982).

133/ See id.

Tax Forms Coordinating Committee
Room 5577
1111 Constitution Avenue, N.W.
Washington, D.C. 20224[134]

Second, local citizen groups should be encouraged to send similar comments to the Committee. Copies of all such letters could be sent to members of Congress to draw their attention to the problem. The efforts of prominent tax lawyers and their organizations such as the relevant American Bar Association committees, as well as tax preparation groups such as H&R Block, should be solicited for their help.

3. Amending the dependent care credit to make it refundable

At various times, advocates for the poor, members of Congress and others have maintained that the child care credit must be made refundable if it is really to aid low-income families.[135] A bill making the credit refundable was first introduced by Senator Kennedy in 1976, the time of enactment of the original child care credit legislation.[136] Although it passed the Senate, the provision was not adopted in the legislation as finally enacted. A provision making the credit refundable was also a key element of the legislation introduced and adopted in the Senate during the debate on the Economic

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[134] The Internal Revenue Service requests that written comments on the 1982 forms be submitted by June 1, 1982. Id.

[135] See, e.g., Civil Rights Commission Report, supra note 30, at 26.

[136] 122 Cong. Rec. S23114 (daily ed. July 21, 1976).

Recovery Tax Act in 1981. Senator Durenberger, upon offering the amendment to make the credit refundable explained:

> Those who need this credit the most are the low-income families, who pay little or no [f]ederal tax. A tax credit is meaningless unless the recipient has some tax liability against which the credit can be claimed.
>
> Unless the dependent care credit is refundable, it will have no impact on the people we most need to reach, the poorest families, those for whom the access to this credit will mean the difference between work and welfare. The refundable credit is a dramatic innovation, one that will bring the benefits of this bill to thousands of families that have never shared the benefits of the current law.[137/]

In the House, Representative Conable had introduced similar child care legislation earlier in the year. He explained that refundability was necessary to make the credit meaningful to "... families who find themselves caught in the middle with too much income to qualify for Head Start or Title XX programs, and too little to afford dependent care on the private market."[138/] The House version of the tax bill never contained a comparable provision on refundability, and the House-Senate Conference Committee refused to adopt this provision.

Although no cost figures are available on the refundability provision alone, the Congressional Research Service estimates that the cost of all 1981 child care tax credit changes will be $19 million in Fiscal Year 1982, $191 million in Fiscal Year 1983

[137/] 127 Cong. Rec. S8447 (daily ed. July 24, 1981).

[138/] *Id.* E518 (daily ed. Feb. 18, 1981).

and $237 million in Fiscal Year 1984.[139] It appears, however, that opposition to refundability in Congress was based less on objection to its cost than on objection to the concept of a refund generally.[140]

If the tax credit is to provide meaningful assistance to those families most in need, it is critical that the credit be made refundable. There is still interest among congressional supporters, notably Senator Metzenbaum, in enacting a refundable credit. His office reports that they will be watching for opportunities to propose this change the next time tax legislation is considered.[141] Whether an increase in tax benefits will be successful at a time when both Congress and the President face pressure to reduce tax expenditures is difficult to say. Nevertheless, given the preference of the current Administration to make social policy through the tax code, and the apparent bi-partisan support for refundability that already exists, efforts to make the child care credit refundable should be pursued.

One strategy to help document the need for refundability would be to collect case examples of families with earned income, substantial child care expenses, but little or no tax liability and thus unable to benefit from the current child care credit.[142] The congressional debate illustrates concern for increasing the benefit of the dependent care credit for low-income families, and many members of Congress thought they were addressing this issue when they adopted the sliding scale credit.[143] Although the sliding scale will certainly benefit families at the lower end of the income spectrum, it still does not reach many working poor families. Specific examples that illustrate this fact would be useful in informing policymakers and the general public about the continued need for refundability.

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[139] Malone, supra note 55, at 11.

[140] This conclusion is based on off-the-record conversations with various congressional staff members in January, 1982. The legislative history of the Economic Recovery Tax Act of 1981 does not address the issue, although it was discussed in previous legislative debates. See, e.g., 122 Cong. Rec. S23114-16 (daily ed. July 21, 1976).

[141] Conversation with Jeanne Connolly, Office of Sen. Metzenbaum, Jan. 21, 1982.

4. Increasing the percentage of the sliding scale credit

Although making the credit refundable would go a long way toward making the dependent care credit meaningful to low-income families, the amount of actual assistance in many cases may still be small. For example, in 1979, families with incomes below $5,000 who took the child care credit claimed average child care costs of only $377.[144] Given a 30 percent credit, the maximum amount of the average credit would be approximately $113.

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[142] It might be particularly pursuasive to have examples of families terminated from AFDC because of the 1981 budget cuts in that program, *see* discussion *infra* Section IV, who cannot take advantage of the dependent care credit because they have no tax liability.

[143] *See* discussion *supra* Subsection B-1.

[144] IRS *Statistics 1979*, *supra* note 102, Table A.

At various times, child care advocates and congressional supporters have argued that the maximum credit for low-income families should be increased. Proposed increases have ranged from 35 percent to 90 percent.[145] Indeed, the child care credit legislation initially proposed in both the House and the Senate would have permitted households earning $10,000 or less to count 50 percent of their expenditures for child care up to the ceiling amount.[146]

Whether it will be possible to achieve an increase in the amount of the credit in the near future is difficult to say. Clearly, however, any increase in the amount of the credit, coupled with a provision making the credit refundable, would significantly increase the benefit of the credit to working families with low earnings.

5. Increasing the Earned Income Tax Credit

The earned income tax credit was first proposed as a work incentive for low-income families.[147] As has been demonstrated, using the dependent care credit in conjunction with the EITC can increase the EITC amount refunded. Thus, any increase in the EITC will benefit those low-income families using the dependent care credit who are eligible for the EITC. Such a change, although not a direct increase in child care benefits, would indirectly increase the amount of funds available to families earning under $10,000. Moreover, unlike some direct increases in the dependent care credit, increases in the EITC are targeted to low-income families.[148]

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[145] *See* H.R. 8109, 96th Cong., 2nd Sess. (1980), 126 Cong. Rec. H8830 (1980); H.R. 4242, 97th Cong., 1st Sess. (1981), 127 Cong. Rec. H5183 (1981); H.R. 4242, 97th Cong., 1st Sess. (1981), 127 Cong. Rec. H5225 (1981).

[146] *See* H.R. 1894, 97th Cong., 1st Sess. (1981), 127 Cong. Rec. E517 (1981); S1478, 97th Cong., 1st Sess. (1981), 127 Cong. Rec. S7595 (1981).

[147] *See* discussion *supra* Subsection C-1.

The earned income tax credit was established as a refundable credit in 1975.[149] At that time the credit was calculated as 10 percent of earned income up to a maximum of $400.[150] The credit decreased in amount from a maximum of $400 to zero as adjusted gross income increased from $4,000 to $8,000.[151] In 1978, the amount of the credit was increased to 10 percent of the first $5,000 of earned income, resulting in a maximum credit of $500, with benefits phased out at income levels above $10,000.[152]

One could argue that the EITC should be increased to reflect higher costs of living brought about by persistent inflation. Such an argument was successfully made in the Congress last year to justify indexing tax brackets to inflation.[153] Proponents of the measure argued that inflation was causing "bracket creep", and that higher taxes were negating increased wages.[154] One could argue that tax benefits for the poor are entitled to similar treatment, and that both the maximum credit of $500 and the ceiling amount of $10,000 should be similarly increased.

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[148] Because not all AFDC recipients with earned income qualify for the EITC, and of course AFDC recipients without earned income do not qualify for the EITC at all, *see* note 114 *supra*, the credit is not targeted on the lowest-income families.

[149] *See* Tax Reduction Act of 1975, Pub. L. 94-12, 89 Stat. 26.

[150] *Id*.

[151] *Id*.

[152] *See* Revenue Act of 1978, Pub. L. 95-600, 90 Stat. 2763.

[153] *See* H. Rep. No. 97-215, 97th Cong., 1st Sess. 200, *reprinted in* 1981 U.S. Code Cong. & Ad. News 376.

6. Increasing the availability of employer-sponsored programs

In addition to maximizing the impact of the dependent care tax credit for low-income families, efforts should be made to increase the availability of employer-sponsored child care for such families. The dependent care assistance program established by the Economic Tax Recovery Act[155] may be one vehicle for organizing efforts to encourage employers to become more involved in the provision of child care.[156]

To date, the few employers that have established on-site child care centers have been large employers who can best bear the attendant costs. Intermedics Inc., a medical equipment manufacturer in Texas, has established the largest employer-sponsored day care center in the country. The company claims several advantages, economic and otherwise. Since the child care center is set up as a wholly-owned but separate for-profit subsidiary of the company, Intermedics claims its costs as a legitimate business expense and deducts them as a loss. Other benefits include favorable publicity and positive community feedback.[157]

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[154] Id.

[155] Economic Recovery Tax Act, Pub. L. 97-34, §124e, 95 Stat. 172 (to be codified in I.R.C. §129).

[156] A sample dependent care assistance plan has been prepared by the Bay Area Child Care Law Project, San Francisco, California, and is available from them at a cost of $2.00.

In addition, unions, particularly those with a high percentage of female employees, should be encouraged to include employer assistance for child care costs as part of the benefits they seek for their employees. For example, New York State public employees have established a successful day care center[158] and the Hospital and Service Employees Union in Los Angeles, California has set up a joint labor-management study to explore funding child care benefits.[159]

Another approach being used by the Polaroid Corporation is to provide vouchers to their employees to subsidize their day care expenses. The amount of the subsidy is based on total family income and the number of members in the employee's family.[160]

Information on these programs could be used by advocates to construct a model to present to other employers on the costs and benefits of such programs.[161]

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[157] See Children's Defense Fund, The Child Care Handbook 33-38 (1982)[hereinafter cited as Child Care Handbook].

[158] See id. at 54-59.

[159] See id. at 81-89.

[160] Conversation with Kathleen A. Murray, Bay Area Child Care Law Proj., Mar., 1982.

[161] See generally Child Care Handbook, supra note 157.

There is still congressional interest in stimulating, through tax incentives, more involvement by employers in the provision of child care. For example, Senator Hawkins is considering ways to increase incentives for businesses to operate child care programs for their employees.[162] Representative Conable continues to be interested in legislation to help child care centers that serve infants and after-school children qualify for tax-exempt status and to help small employers provide child care on a consortium basis.[163] These proposals, like the dependent care assistance program enacted in 1981, are not targeted to low-income families and therefore are not discussed at length here. However, increased efforts to provide encouragement to employers to make child care available to their employees, especially low-income employees, should be made.

A final area to consider in developing strategies to increase the involvement by employers in the provision of child care is the relationship of the federal tax provisions to similar state or local tax provisions, if any. Thus, as with the federal dependent care credit generally, the federal tax advantages for employers who assist their employees in meeting child care expenses, and for employees who receive such assistance, may be more or less favorable than any state or local tax advantages.

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[162] Conversation with Robin Rushkin, Office of Sen. Hawkins, Jan. 21, 1982. See also Statement of Sen. Hawkins at the Hearings on the Economic Status of Women Before the Joint Economic Committee, 97th Cong., 2nd Sess. (1982).

[163] Conversation with Martha Phillips, Minority Staff, House Ways & Means Comm., Jan. 21, 1982.

Advocacy efforts need to be made at the local level that will ensure, at the least, parallel treatment of employer-provided child care by local and federal taxing authorities to ensure that taxpayers receive the full benefit of the federal provisions.[164]

III. SOCIAL SERVICES BLOCK GRANT PROGRAM

A. Introduction

Federal funding pursuant to Title XX of the Social Security Act[165] has been a principal source of support for child care services for low-income families since 1975. Title XX provides funding to states to purchase child care services directly from providers -- principally day care centers, but also family day care homes. Children from eligible families are then placed in program slots subsidized by this funding. In 1978, the Department of Health, Education and Welfare (now Health and Human Services) estimated that Title XX provided child care services to about 800,000 children per year.[166] In 1981, the Congressional Research Service estimated that $715 million in federal Title XX funds were spent by the states for child care services.[167]

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[164] Legislation to gain favorable tax treatment of dependent care assistance plans at the state level has been introduced in California. Conversation with Kathleen A. Murray, Bay Area Child Care Law Proj., Mar. 31, 1982.

[165] 42 U.S.C. §1397 (Cum. Supp. 1975-80).

[166] *See* CBO Report, *supra* note 12, at 28. The Congressional Budget Office notes that this estimate may be substantially lower than the actual number of children served. *Id.*

[167] *See* Malone, *supra* note 55, at 1.

The Omnibus Budget Reconciliation Act of 1981[168] amends Title XX to create a new Social Services Block Grant Program. The changes in Title XX effectuated by the Act have significant programmatic and budgetary consequences for low-income families who rely on these subsidized child care services.

B. Statutory Changes

Speaking on behalf of the Reagan Administration's original block grant proposal, Secretary Schweiker stated:

> We believe that [the block grant] approach to social services will resolve several problems caused by the multiplicity and categorical nature of the present Federal-State social services programs. First, it allows States and localities the flexibility they need to distribute social services funds, and to give priority to services which best meet the needs of the residents of the State. Second, by eliminating many burdensome Federal administrative requirements, standards and the like, the block grant will permit more efficient...administration, thus freeing resources for the provision of services.[169]

The block grant program, as finally enacted, alters the Title XX program in two significant ways. First, it nearly eliminates the role of the federal government in directing and monitoring the use of federal social services program dollars. Second, it reduces by 25 percent the total amount of federal dollars available for state social services programs.

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[168] Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, §2352, 95 Stat. 357.

[169] Spending Reduction Proposals: Hearings Before Senate Comm. on Finance, 97th Cong., 1st Sess. 35 (1981) (statement of Richard S. Schweiker, Sec'y, Dep't of Health & Human Servs.) [hereinafter cited as "Spending Reduction Proposals"].

Under the original Title XX program, states were eligible to receive funds to provide social services directed at the following statutory goals: achieving or maintaining economic self-support or self-sufficiency; preventing the abuse, neglect or exploitation of children and adults unable to protect their own interests; and preventing or reducing inappropriate institutional care or securing referral or admission for institutional care when other forms of care are not appropriate.[170] The services included, but were not limited to: child care services; adult and child protective services; adult and child foster care services; homemaking services; training and employment services, information, referral and counseling services; delivery of meals services; services to meet the needs of the physically or emotionally disabled, including drug addicts and alcoholics; and personnel training or retraining services directly related to the provision of any of the above social services.[171]

Although the states had broad discretion in allocating funds under Title XX, the statute contained a specific requirement that a portion of the funds be allocated to child care services.[172] Moreover, payment of Title XX funds for child care services was expressly restricted to care which met applicable state standards, when care was in the child's home, and federal standards, as set forth by the 1968 Federal Interagency Day Care Requirements ("F.I.D.C.R."), when care was provided outside the child's home.[173]

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[170] 42 U.S.C. §1397a(a)(1)(Cum. Supp. 1975-80).

[171] Id.

[172] Id. §1397a(a)(17)(A).

The law further specified that part of each state's Title XX allocation had to be spent for the provision of services to low-income families, specifically to recipients of AFDC, Supplemental Security Income ("SSI"), or Medicaid,[174] and that federal dollars were generally not to be used for services provided to families with incomes above 115% of the state's median family income.[175]

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[173] See 42 U.S.C. §1397a(a)(9)(A)(Cum. Supp. 1975-80). The statute contained several specific exceptions to the F.I.D.C.R. requirements for Title XX programs, relating to educational services and child/staff ratios. See id. §1397a(9)(A)(ii). In addition, the statute mandated the Secretary to conduct an evaluation of the appropriateness of the F.I.D.C.R. requirements and to recommend needed modifications prior to April 1, 1978. See id. §1397a(9)(B). As a result of delay in completing this study and concerns voiced by many states that compliance with the requirements would be difficult without increasing costs and reducing services, Congress postponed implementation of the staffing standards several times. See Pub. L. 94-120, §3, 89 Stat. 609 (1975); Pub. L. 94-401, §5, 90 Stat. 1218 (1976); Pub. L. 95-171, §1, 91 Stat. 1353 (1977). In 1979, the Department of Health, Education and Welfare extended the moratorium, by regulation, until revised day care regulations could be promulgated in final form. 44 Fed. Reg. 16399 (Mar. 19, 1979). The Department issued proposed regulations in June 1979, 44 Fed. Reg. 34754 (June 15, 1979), which were published in final form on Mar. 19, 1980, to take effect on October 1, 1980. 45 Fed. Reg. 17870 (Mar. 19, 1980). Shortly thereafter, however, Congress again postponed the effective date of the regulations to July 1, 1981, but provided that Title XX-funded day care would be subject to applicable state and local standards. Omnibus Reconciliation Act of 1980, Pub. L. 96-499, §1001, 94 Stat. 2655. Anticipating the passage of the Social Services Block Grant program, the Reagan Administration issued a regulation again postponing the effective date of the regulations to January 2, 1982. 46 Fed. Reg. 37051 (July 17, 1981). See generally Malone, supra note 55, at 9-10. Thereafter, the Social Services Block Grant Program eliminated the statutory basis for federal regulation of day care standards, see Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, §2352, 95 Stat. 357, and the Department of Health and Human Services repealed the F.I.D.C.R. requirements, 47 Fed. Reg. 7668 (Feb. 22, 1982).

[174] 42 U.S.C. §1397a(a)(4)(Cum. Supp. 1975-80).

The law required that each state submit a detailed written services plan for approval by the Secretary of the Department of Health and Human Services in order to receive its share of federal dollars.[176] Title XX expressly set forth the contents of the plan[177] and the procedure for developing it, including a requirement for public participation at specified times during the planning process.[178] States were expressly required to publish their services plans at least ninety days prior to the date of implementation and allow a forty-five day period of public comment.[179]

In addition, Title XX mandated that every state participating in the program report periodically to the federal government pursuant to reporting requirements prescribed by the Secretary,[180] provide a fair hearing procedure to individuals denied claims for services[181] and provide safeguards against the disclosure of confidential information.[182] A state that substantially failed to comply with either its own services plan or any requirement imposed by federal law, following notice and an opportunity to be heard, faced the possible termination or suspension of federal payments.[183]

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[175] Id. §1397a(a)(6). No family income limitation was imposed on the use of information or referral services, family planning services or protective services for children or adults. Id.

[176] Id. §§1397a(a)(3), 1397b(d).

[177] Id. §1397b(d)(1).

[178] Id. §1397c.

[179] Id. §§1397c(2), 1397c(3).

[180] Id. §1397b(a). See 45 C.F.R. §1396.17 (1980).

[181] 42 U.S.C. §1397b(d)(1)(A)(Cum. Supp. 1975-80).

Finally, the ceiling on federal funding for social services under the old Title XX law was set at $2.9 billion for Fiscal Year 1981 and was to be increased by $0.1 billion annually until it reached a level of $3.3 billion in Fiscal Year 1985.[184] For most Title XX services, each state had to provide 25% of the cost.[185] In Fiscal Year 1981, as in previous years, $200 million was earmarked for child care services and 8 percent of the total appreciation was set aside by law for such services in subsequent years.[186] No matching funds were required for the use of these child care monies.[187] In addition, states were permitted to, and often did, use additional Title XX monies to fund child care services.[188]

The new block grant program does not contain a requirement that any of the funding be allocated for child care programs.[189] Equally significant, the new statute contains no requirement that child care furnished with Title XX money meet the standards set forth in the Federal Interagency Day Care Requirements. In place of federal standards, the new block grant requires merely that day care services receiving federal funding meet applicable standards of state and local law.[190]

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[182] *Id*. §1397b(d)(1)(B).

[183] *Id*. §§1397b(c)(1),(2).

[184] *Id*. §1397a(a)((2)(A)(ii).

[185] *Id*. §1397a(a)(1). The matching funds could be provided from state, local or even private funds.

[186] *Id*. §1397a(a)(17)(A)(i).

[187] *Id*.

[188] Malone, *supra* note 55, at 1. These funds were subject to the 25% matching requirement. *See* 42 U.S.C. §1397a(a)(1)(Cum. Supp. 1975-80).

In addition, the eligibility requirements that targeted Title XX spending on low-income families have been abolished. States are no longer required to spend a specified percentage of their federal dollars on the provision of services to recipients of AFDC, SSI or Medicaid.[191] Further, the restriction against the use of federal funds to provide services to families with incomes above 115% of state median income has been abolished. The result of these changes is that the states have significantly more discretion in deciding how to spend their social services block grant funds.

At the same time that states have been given greater control over the use of Title XX funds, the federal oversight requirements of the statute, which assured some measure of accountability, have been substantially reduced. States are no longer required to submit a detailed written services plan, although the new law mandates that states submit a report to the Secretary outlining the intended use of social services block grant funds.[192/] The state report must include information on the types of activities to be funded, and the characteristics of individuals to be served.[193/] If states spend funds on activities not included in their reports, they are required to revise their reports throughout the year to reflect the changes in funding, if substantial.[194/]

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[189] The provision that Title XX funds may be used to pay the wages of employees of public or non-profit day care centers up to a maximum of $6,000 per employee, or $5,000 per employee in the case of employees of any other type of child care provider, remains unchanged by the Omnibus Budget Reconciliation Act. Compare Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, §2352, 95 Stat. 357 with 42 U.S.C. §1397e-1(b)(Cum. Supp. 1975-80).

[190] See Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, §2352, 95 Stat. 357. This change eliminates the statutory basis for federal regulation of day care standards. See Malone, supra note 55, at 8-10.

[191] H. Rep. No. 97-208, 97th Cong. 1st Sess. 992, reprinted in 1981 U.S. Code Cong. & Ad. News 1354.

Moreover, the requirements on reports that states must submit to the Secretary after the funds are spent have been substantially altered. Where once the Secretary was authorized to prescribe the content of reports, states are now free to report only such information as the state determines to be necessary to provide an accurate description of the purposes for which funds are spent, and states are to determine the frequency of reporting so long as a report is filed at least once every two

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[192/] *See* Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, §2352, 95 Stat. 357.

[193/] *Id*. However, "[n]o particular form is required for a state's application or the related submission required by statute." 46 Fed. Reg. 48588 (Oct. 1, 1981) (to be codified in 45 C.F.R. §96.10).

[194/] Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, §2352, 95 Stat. 357.

years.[195] Each state is also required to submit an audit at least every two years and must repay amounts "ultimately found not to have been expended in accordance with this title".[196] In the preamble to the interim final regulations the Secretary indicates that maximum flexibility should be provided to the states in this area, too.[197] Indeed, the regulations provide that in resolving any issue raised by a complaint or federal audit, the Department will defer to a state's interpretation of its assurances and of provisions of the federal statute unless the interpretation is clearly erroneous.[198]

In addition, public participation requirements have been substantially weakened under the new statute. No public hearing is required. The statute merely requires that a state's services report be made public "in such manner as to facilitate comments from any person during the development of the report and after its completion."[199]

Finally, the new law imposes a severe reduction in the overall amount of federal funds available to social services programs. Although the range of programs consolidated in the new block grant is the same as under the old Title XX provisions, the total federal allocation for Fiscal Year 1982 was set at $2.4 billion.[200] This represents a reduction of over 25% from amounts available for the same programs in Fiscal Year 1981.[201] Moreover, not only are none of these amounts specifically allocated for child care, but the requirement that states match federal social services funds with non-federal monies has been totally eliminated,[202] possibly resulting in further reductions in social services programs. For Fiscal Year 1983, the Reagan Administration has proposed an additional reduction in the funding for the Social Services Block Grant Program, requesting only $1.9 billion.[203]

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[195] See id.

[196] Id.

[197] 46 Fed. Reg. 48584 (Oct. 1, 1981).

[198] See 46 Fed. Reg. 48590 (Oct. 1, 1981) (to be codified in 45 C.F.R. §96.50).

[199] Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, §2352, 95 Stat. 357. The general requirements contained in §1742(c) of the Omnibus Budget Reconciliation Act, governing use of funds and public hearings for block grants to "units of local government or other eligible entities" are not applicable to the Social Services Block Grant Program because Title XX only funds state governments.

C. Impact of Statutory Changes

With the abolition of most federal oversight authority and virtually all federal requirements, the social services delivery system of the past several years has been transformed. As a consequence, the ability to make any meaningful comparisons among the states or, indeed, even to document their differences, has disappeared.

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[200] See id. §2352. The allocation for Fiscal Year 1983 was set at $2,450,000, for Fiscal Year 1984 at $2,500,000, for Fiscal Year 1985 at $2,600,000 and for Fiscal Year 1986 at $2,700,000. Id.

[201] S. Rep. No. 97-139, 97th Cong., 1st Sess. 529, reprinted in 1981 U.S. Code Cong. & Ad. News 795.

[202] See H. Rep. No. 97-208, supra note 191, at 992. In addition, states are permitted to transfer up to 10 percent of their allotment for any fiscal year for use under other health block grant or low-income home energy assistance block grant programs. See Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, §2352, 95 Stat. 357.

[203] President's 1983 Budget, supra note 59, at 5-109.

In addition, the amount of money available for social services programming has been dramatically decreased. Consequently, competition for funds among various programs at the local level has been intensified. States, for example, are being forced to make difficult choices between their need to continue child care programs, and their equally pressing need to maintain child protective services, elderly feeding programs, and the like. Even the programs that survive are likely to be cut.

With respect to child care services specifically, states are already beginning to develop a variety of responses to cope with funding cuts. Several states have reduced the number of children served by child care programs. In Utah, for example, the state has recently implemented a waiting list for recipients seeking child care and is considering raising its fee structure.[204] In Alabama, the number of Title XX-subsidized day care slots has been reduced from 11,000 to 8,500.[205] The state plans to focus its Title XX funds on protective services and day care for children of working mothers, although the need in the latter category is greater than the state expects to be able to meet. In Michigan, the budget cuts in social services funding resulted in an almost 25 percent reduction in the number of children served.[206]

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[204] Conversation with Robin Paige, Utah Legal Servs., Dec. 1981.

[205] Conversation with J.D. Schremser, Pub. Info. Director, Ala. Dep't Pensions & Security, Dec. 1981.

States have also responded to reduced federal social services funding by lowering the income eligibility level for subsidized child care.[207] Massachusetts, for example, has lowered the standard for determining the eligibility for services to include only persons within 70% of the state's median income.[208]

In Illinois, the state is not only contemplating lowering its Title XX eligibility standard, but is also considering modifying its fee structure so that families who are not eligible for the full subsidy will pay a fee for each child in care rather than the current single-fee-per-family.[209] Arkansas, too, has imposed a new fee requirement, which is tied to family income. Preliminary results of a recent Arkansas survey show that children have had to leave care as a result of the fees and that parents have had to quit work to care for their children.[210]

As a result of the substantial reduction in Title XX funds, some states, including Illinois and Colorado, are considering requiring recipients of Aid to Families with Dependent Children benefits to pay directly for child care previously funded under Title XX, and then treat the cost of that care as a disregarded work expense for purposes of calculating their AFDC eligibility and benefits.[211] Because the AFDC disregard for child care expenses is limited to $160 per child, per month, however, these states would permit recipients whose child care expenditures exceed this amount to receive a supplemental subsidy under the Social Services Block Grant Program.[212]

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[206] Conversation with Helen Blank, Children's Defense Fund, Apr. 21, 1982.

[207] CDF Budget Analysis, supra note 59, at 111-112. These states include Pennsylvania, Washington and West Virginia. Id.

[208] Conversation with Jim Baxster, Director of Day Care Progs., Mass. Dep't Soc. Servs., Dec. 1981. See also Mass. Dep't Soc. Servs., Day Care Fact Sheet, Dec. 16, 1981.

[209] Conversation with Phil Hatmaker, Chief, Bur. Soc. Servs., Ill. Dep't Pub. Aid, Dec. 1981; Conversation with Scott Umbreit, Bur. Title XX Ad., Ill. Dep't Pub. Aid, Dec. 1981.

[210] Conversation with Helen Blank, Children's Defense Fund, Apr. 21, 1982.

D. Strategies

Title XX initially was a modified block grant program that contained some specific federal requirements. Changing Title XX to a social services block grant simply removed most of these specific requirements. Therefore, as in the past with the Title XX program, advocacy efforts must be focused at the state and local level. Nonetheless, there still are some parts of the statute that can be useful in influencing the distribution of funds in local communities.

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[211] Conversation with Phil Hatmaker, Chief, Bur. Soc. Servs., Ill. Dep't Pub. Aid, Dec. 1981; conversation with Scott Umbreit, Bur. Title XX Ad., Ill. Dep't Pub. Aid, Dec. 1981; conversation with David Ashmore, Director, Colo. Dep't Soc. Servs., Dec. 1981. See also example and discussion infra Section IV.

[212] Conversation with Phil Hatmaker, Chief, Bur. Soc. Servs., Ill. Dep't Pub. Aid, Dec. 1981; conversation with Scott Umbreit, Bur. Title XX, Ill. Dep't Pub. Aid, Dec. 1981; conversation with David Ashmore, Director, Colo. Dep't Soc. Servs., Dec. 1981. See also discussion infra Subsection D & Section IV.

The requirement that a state obtain public input on its intended distribution of funds provides a basis for a strategy to influence that process. First, an attempt should be made to work informally with the staff of the state department of social services as they make their internal determinations on the distribution of funds. However, if this is not possible or desirable, written comments should be submitted on the state report when it is made available to the public.[213] In addition, state administrators should be urged to continue their practice under Title XX of holding a public hearing, as the most effective means of securing citizen input. In this way a public record can be developed to demonstrate the services needs of people in the state.

Within this general framework, a vigorous campaign can be pursued to assure continued funding of child care services.[214] Because there is no longer any requirement that funds be specifically allocated for child care, advocates will have to work to ensure that states continue to support such care. As in the past, child care programs will have to compete with all other services to secure funding. Thus it is important to collect factual data that will support an argument for continued or even expanded funding of child care. For example, data might be collected on the number of low-income families who are currently using day care, whether waiting lists exist, whether other day care programs are available and their cost, as well as the impact generally of the loss of day care on low-income families. The data should include some assessment of the effect of cuts in other programs on the availability of child care.[215]

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[213] In particular, advocates should examine the state report closely to determine if the services being supported further the federal statutory goals and point out any discrepancies through the public comment process. Although the goals themselves are broad, e.g., "achieving or maintaining economic self-support to prevent, reduce or eliminate dependency," they are more restrictive than those that would be found in a general revenue-sharing program.

[214] See generally Children's Defense Fund, Child Watch Assessment Kits (1981); Children's Defense Fund, Child Care Handbook, supra note 157, 105-16.

Moreover, affirmative and creative approaches to ways in which communities can absorb budget cuts, other than by cutting back on child care services to low-income families, need to be developed and presented to state officials. To the extent that states are altering their eligibility standards and fee schedules, ways should be found to ensure that these alterations continue to target eligibility for child care on those at the lowest income levels. Although states are now free to make these services available to higher-income groups, there is no indication to date that states are moving in that direction. However, to the extent that states have to make changes, it might be better to increase the number of children from families with higher income levels (and charge them a fee) or, if absolutely necessary, to charge minimal fees to families with lower income levels than to close centers entirely, resulting in a loss of services to _all_ low-income families.[216]

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[215] _See_ discussion _infra_ Section IV.

[216] Because the Head Start Program was continued at its prior level, families whose children are eligible for Head Start might (continued)

If states act arbitrarily or unreasonably, state statutes that authorize challenges to state administrative or other action that is arbitrary or capricious might be helpful. These statutes could be used to assist low-income individuals in their efforts to make their states more responsive to their needs.[217]

Another basis for potential advocacy, including litigation, is the federal statutory requirement that child care services funded under the Social Services Block Grant Program comply with applicable state and local standards. Although the statute no longer requires adherence to federal day care requirements, in anticipation of the imposition of these requirements many states enacted provisions to regulate child care programs. Thus, all states, including the District of Columbia, license day care centers and forty-five states, including the District of Columbia, regulate family day care homes.[218] It will be important to ascertain if these laws are sufficient to protect the safety and well-being of children, if states have adequate

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see if there are spaces available in those projects.

[217] In addition, state laws or constitutional provisions may provide a basis for other litigation, for example, to get state legislative oversight hearings if it is determined that there are more allies in the legislature than in the state house on these issues. *Cf*. *Shapp v. Sloan*, 480 Pa. 449, 391 A.2d 595 (1978), *appeal dismissed sub nom*. *Thornburgh v. Casey*, 440 U.S. 942 (1979); *Anderson v. Regan*, 53 N.Y. 2d 356 (Ct. App. 1982). And, of course, if there is discrimination in the allocation of federal monies on the basis of race, sex, or disability, Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 *et seq*., or §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, might be helpful if the requirements of these statutes can otherwise be met.

[218] *See generally* Lawrence Johnson & Assocs., Inc., *Comparative Licensing Study* (1978).

resources to enforce these requirements, and, if so, to determine whether their enforcement will increase the availability of federally-funded, adequate child care. Both organizing and litigation strategies need to be developed in this area.

It is also important to assure that the lowest income families, including AFDC recipients, continue to be eligible for subsidized child care. In states in which the financing of child care for AFDC families is being shifted from Title XX to the AFDC child care expense disregard, many families cannot continue to afford the day care their children are currently receiving. This results not only in a disruption of a family's child care arrangements, but also severely reduces the enrollment at Title XX-funded day care centers.[219/] One strategy which, as discussed above, is currently being considered by a few states, is to have the state continue to subsize child care expenses for AFDC recipients that are more than $160 per month, per child out of their social services block grant funds. This approach enables more families to benefit from the reduced social services funding.

In pursuing all of these strategies, it is important to work closely with parent associations and other groups concerned about low-income children. It may also be helpful to work with other interest groups competing for social services funds. By working together whenever possible a more equitable distribution of funds, that better meets the services needs of the entire community, may be achieved.

[219/] Conversation with Helen Blank, Children's Defense Fund, Apr. 21, 1982.

IV. AID TO FAMILIES WITH DEPENDENT CHILDREN

A. *Introduction*

Last year, the Reagan Administration proposed major changes in the Aid to Families with Dependent Children program to restrict both eligibility for, and the amount of, benefits. Most of these changes were adopted by Congress in the Omnibus Budget Reconciliation Act of 1981 and are now being implemented by the states.[220] The changes include a substantial reduction in the amount of earned income that is disregarded in determining eligibility and payment levels;[221] a limitation on eligibility to individuals with gross incomes of 150% or less of the state standard of need;[222] mandatory retrospective budgeting;[223] a state option to count food stamps and housing subsidies as income;[224] a mandatory reduction of benefits to recover overpayments;[225] and a restriction in benefits for pregnant women.[226] They also include an authorization to the states to establish three new work programs -- Work Incentive Demonstration programs,[227] Community Work Experience programs[228] and Work Supplementation programs.[229]

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[220] Although the effective date of most of these changes was October 1, 1981, the Act specifically provides that when a state agency can demonstrate, to the satisfaction of the Secretary, that it cannot comply with the new provisions, because of state law, the changes would not take effect until the first month after the close of the first state legislative session ending on or after October 1, 1981. Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, §2321, 95 Stat 357.

Despite this provision, some state welfare departments immediately implemented the federal changes without the necessary changes in state law or, in some cases, without following state administrative procedure act requirements. Advocates in some of these states obtained judicial orders delaying implementation of the changes until states complied with inconsistent state law or with state administrative procedure act requirements. *See*, *e.g.*, *Minnesota Recipients Alliance v. Noot*, *preliminary injunction granted*, No. 4-81 Civ. 658 (D. Minn. Oct. 29, 1981), *aff'd*, No. 81-1031 (Minn. Sup. Ct. Dec., 1981); *Clutchette v. Brown*, *preliminary injunction granted*, No. 384708 (Super. Ct. Cal.); *Ganigan v. Sunn*, *TRO granted*, No. 7245 (Ha. 3d Cir. Ct. Oct. 16, 1981), (preliminary injunction and summary judgment later denied); *Costa v. Sunn*, *TRO granted*, No. 68124 (Ha. 1st Cir. Ct. Nov. 13, 1981), *TRO dissolved*, No. 8549 (Ha. Sup. Ct. Nov. 16, 1981), *summary judgment denied*, No. 384708 (Ha. 1st Cir. Ct), *rev'd*, No. 8549 (Ha. Sup. Ct. Mar. 16, 1982); *Garcia v. Ingram*, *preliminary injunction granted*, No. 81-1877 (1st Jud. Dist. N.M. Oct. 26, 1981). *See also Philadelphia Citizens in Action v. Schweiker*, *permanent injunction granted*, No. 81-4452 (E.D. Pa. Nov. 20, 1981), *rev'd*, Nos. 81-2915/16, 81-2942 (3d Cir. Jan. 15, 1982), challenging the implementation of changes in the law on

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The Administration estimated that as a result of all the changes in the law, approximately 408,000 of the 3.9 million families on AFDC, or more than 10 percent, would lose their AFDC benefits entirely and that another 279,000, or 7 percent, would

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federal Administrative Procedure Act grounds.

[221] Omnibus Budget Reconciliation Act, Pub. L. 97-35, §2301, 95 Stat. 357.

[222] Id. §2303.

[223] Id. §2315.

[224] Id. §2302.

[225] Id. §2318.

[226] Id. §2312.

[227] Id. §2308.

[228] Id. §2307.

[229] Id. §2309.

lose some of their benefits.[230] The major impact of the changes is on recipients with some income from work. One study, published at the time the cuts were proposed, estimated that the income of AFDC repicients who were not in the paid labor force would drop 4 percentage points as a result of combined AFDC and food stamp cutbacks, while the income of working recipients would fall by more than five times that amount, or 21 percent.[231]

Because virtually all of the cuts in the AFDC program were targeted on recipients engaged in paid employment, the resulting reduction in income of these individuals will surely affect their ability to obtain the child care they need[232] in order to continue working.[233] The remainder of this section will focus on the changes in two areas -- the work expense disregard for child care and the work programs -- which will have a direct impact upon both these child care needs and the way in which these needs are met for AFDC recipients and applicants.

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[230] See Demkovich, Reagan's Welfare Cuts Could Force Many Working Poor Back on the Dole, Nat'l J. 18 (Jan. 2, 1982).

[231] See generally T. Joe, C. Rogers, R. Weissbourd, Ctr. for Study of Welfare Pol'y, Univ. of Chicago, The Poor: Profiles of Families in Poverty (1981). A recent nationwide survey by the American Public Welfare Association revealed that 66,000 more families than the Administration predicted will be affected by the budget cuts. American Pub. Welf. Ass'n, Survey of States Shows FY 1982 Welfare Savings Less than Half Administration Estimates 1 (Feb. 8, 1982). Although fewer families will be terminated than predicted, many more families will experience benefit reductions. Id. at 1-2. At the same time the federal savings are less than half the amount originally predicted by the Administration. Id. at 1.

[232] One third of the children receiving AFDC are under the age of six and more than four fifths are under the age of twelve. Soc. Sec. Ad., U.S. Dep't of Health & Human Servs., AFDC Recipient Characteristics Study, Part 1, at 2 (1977)[hereinafter cited as "AFDC Characteristics"].

[233] A significant portion of AFDC recipients are in the paid work force. For example, in 1977, the most recent year for which data are available, 91.4 percent of all AFDC families had a natural or adoptive mother in the home. Of this group, over 25 percent were in the paid labor force -- 14 percent were employed, 11 percent were actively seeking work and 1 percent were awaiting (continued)

B. Child Care Expense Disregard

1. Statutory changes

Prior to the passage of the Omnibus Budget Reconciliation Act of 1981, AFDC applicants and recipients were permitted to exclude from consideration as earned income any expenses reasonably attributable to the earning of that income in calculating both their eligibility for and the amount of the assistance payment.[234] The principle embodied in the work expense disregard was that an employed individual should not be placed at a disadvantage financially because of the out-of-pocket costs incurred in going to work.[235]

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recall from a lay-off. Id. In addition, 3.2 percent were attending school or receiving training. Id. at 44. Moreover, almost half (47.9 percent) of the mothers were not in the labor force because they were needed as full-time homemakers or were incapacitated. Id. Of the remaining 1 in 5 mothers, about half were registered for the Work Incentive Program, see 42 U.S.C. §602(a)(19). AFDC Characteristics, supra note 232, at 2.

[234] 42 U.S.C. §602(a)(7) (Cum. Supp. 1975-80).

[235] The work expense disregard should be distinguished from the work incentive disregard of the first $30 plus 1/3 of the remainder of earned income, see id. §602(a)(8), the purpose of which is to encourage recipients and applicants to work by permitting them to keep approximately one third of their earned income without affecting the amount of their AFDC payment. The Omnibus Budget Reconciliation Act significantly restricted the work incentive disregard in two ways. First, its use is restricted to the first four months of employment. Omnibus Budget Reconciliation Act, Pub. L. 97-35, §2301, 95 Stat. 357. (continued)

In Shea v. Vialpando,[236] the Supreme Court held, in striking down Colorado's work expense disregard that did not permit deductions for actual expenses in excess of a fixed standard, that Congress did not intend that any limitation, apart from reasonableness, be placed upon the recognition of AFDC work expenses. Nonetheless, application of the work expense disregard has varied considerably from state to state and has continued to be a subject of litigation. For example, until 1976, Hawaii routinely refused to allow deductions for any work-related expenses of AFDC recipients.[237] Other states have drawn distinctions between allowable and disallowable categories of expenses without regard to their "reasonableness". For example, Illinois prohibited AFDC recipients from disregarding child care expenses but not other work expenses from their earned income.[238] And in Utah it is reported that the state continues to deny claims for work expenses based on child care costs.[239]

The disparate application of the work expense disregard among the states was the focus of criticism by the Reagan Administration. The thrust of that criticism, however, reveals a

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Second, the order of the application of the disregard is changed: first, the state must apply the work expense and child care expense disregards; then the $30 and 1/3 disregard is applied to the remainder of earned income. Id. §2301.

[236] 416 U.S. 251 (1974).

[237] See Perez v. Chang, 438 F. Supp. 238 (D. Ha. 1977).

[238] See Simpson v. Miller, summary judgment granted, No. 81C-2985 (N.D. Ill. Mar. 17, 1982).

[239] Conversation with Robin Paige, Utah Legal Servs., Dec. 14, 1981.

somewhat different concern. Terming allowable AFDC disregards (including the work incentive disregard) "generous," Secretary Schweiker, speaking in support of the President's Economic Recovery Program, stated:

> ... the present policy on treatment of work expenses, which does not define or limit what types of expenses may be disregarded, prevents the use of reasonable controls which contribute to administrative burden.[240]

Thus, in order to "...simplify administration, reduce error and provide and [sic] incentive for AFDC recipients to find the most economic ways to meet their work expenses,"[241] the Reagan Administration proposed two changes in the recognition of those expenses. First, the Administration proposed separating work expenses into two categories: work-related child care expenses and all other work-related expenses.[242] Second, the Administration proposed limiting the amount of the allowable disregards to $50 per month, per child for child care expenses and $75 per month for all other work-related expenses.[243]

As enacted by Congress, the Omnibus Budget Reconciliation Act of 1981 incorporated the basic Reagan proposal to separate out child care expenses and to limit both work expense disregards. The $75 cap on work expenses was approved.[244]

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[240] Spending Reduction Proposals, supra note 169, at 32.

[241] Id. at 63.

[242] Id.

[243] Id.

[244] Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, §2301, 95 Stat. 357.

However, recognizing that $50 per month, per child was far too low an amount to cover the actual costs of child care, Congress raised the cap on child care expenses to $160 per month, per child.[245]

In pertinent part, Section 2301 of the Omnibus Budget Reconciliation Act provides that the state agency:

> shall disregard from ... earned income ... an amount equal to expenditures for care in such month for a dependent child, ... to the extent that such amount (for each such dependent child...) does not exceed $160 (or such lesser amount as the Secretary may prescribe in the case of an individual not engaged in full time employment or not employed throughout the month)....[246]

Thus the statute limits the disregard for child care expenses to actual expenditures up to a maximum of $160 per month, per child for a caretaker employed full time during the month. In addition, the statute authorizes the Secretary of the Department of Health and Human Services to prescribe a lower maximum for persons working less than full time or less than a full month.[247]

On February 5, 1982, the Department of Health and Human Services published final regulations, effective October 1, 1981, governing the implementation of these and other changes in the AFDC program contained in the Omnibus Budget Reconciliation Act of 1981.[248] In these regulations the Secretary delegated to the states his authority to prescribe a lower maximum on child care expenses for individuals working less than full time or less than a full month.[249]

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[245] Id.

[246] Id.

[247] Id.

2. Strategies

A disregard for work expenses, including child care expenses, enables AFDC beneficiaries to choose the kind of care they wish for their children.[250] However, because they must pay for care out of their own pockets, and then later be "reimbursed" through the disregard, AFDC beneficiaries must first have the money to pay for care[251] before it can be purchased, which is difficult for low-income individuals living on tight budgets.[252]

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[248] *See* 47 Fed. Reg. 5648 (Feb. 5, 1982). These final regulations revised, in part, the interim final regulations issued earlier by the Department of Health and Human Services, 46 Fed. Reg. 46750 (Sept. 21, 1981).

[249] 47 Fed. Reg. 5677 (Feb. 5, 1982) (to be codified in 45 C.F.R. §233.20(a)(11)(C)).

[250] The statute has never limited the kind of care that may be financed by the disregard. In this respect the disregard generally resembles the dependent care tax credit. *See* discussion *supra* Section II. Under both programs, however, the "choice" is, of course, limited by other factors such as cost and the availability of suitable care.

[251] In contrast, under Title XX care may be provided directly to an individual without charge to that individual. *See* discussion *supra* Section III.

[252] Indeed, in part because of this difficulty, the work expense disregard as a method of financing child care seems to have been under-utilized in the past. *See* S. Law, Women, Work & Welfare 121-23 (1981)(unpublished manuscript).

a. Maximizing the use of the disregard

Because of under-utilization of the work expense disregard in the past, and cutbacks in other programs that have previously financed child care for AFDC recipients,[253] the first strategy must be to make sure that AFDC recipients know about and take advantage of the child care expense disregard. The extent to which use of the disregard will be sufficient to finance their child care costs may, however, vary from state to state.

Although the Reagan Administration intended the establishment of a fixed ceiling on the dollar amount of the child care expense disregard to be more restrictive than prior law,[254] the effect of the change may, in some states, be just the opposite. For example, in states which have not recognized child care as an allowable work expense -- either formally or informally -- or have not recognized expenses of up to $160 per month, per child, the effect of the statutory change may be to create the clear authority for a child care expense disregard in a higher dollar amount than could realistically have been achieved under prior law.[255] In these states advocates may want to launch a public education campaign to ensure that recipients achieve the full benefit of the new child care expense disregard. This could involve working with recipient groups and child care advocates as well as local social services offices and child care providers to assure that both recipients and social services workers are familiar with the statutory change.

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[253] See discussion supra Section III.

[254] See 42 U.S.C. §602(a)(7) (Cum. Supp. 1975-80).

[255] This could mean, for some recipients, the ability to purchase child care of a higher quality, because the $160 figure represents an increase in the amount they have been paying for care because of their state's refusal to recognize a higher amount.

In other states, the statutory limitation on child care expenses will represent a decrease in the expenses the state had recognized under prior law.[256] In these states[257] advocates have the more difficult task of documenting the amounts AFDC recipients must pay for child care and seeking alternative means of financing that care.

One means of financing child care for all AFDC recipients whose child care costs are more than $160 per month, per child may be attractive to states that are trying to minimize the effect of federal cuts in Title XX as well because it combines the full use of the AFDC disregard and a reduced use of Title XX-funded care.[258] Under this approach, the AFDC recipient pays the initial $160 per child cost of care to the Title XX-funded provider, and this amount is disregarded in calculating the AFDC grant. The state then pays the cost of the care in excess of $160 with Title XX Social Services Block Grant funds.[259] The following example illustrates this approach:

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[256] Moreover, because for the first time there is a separate disregard for child care expenses and for other work expenses -- and a separate limitation imposed on both -- to the extent that recipients were able to finance higher child care expenses because of lower work expenses of other kinds -- and still stay within an overall work expenses allowance their state may have formally or informally recognized -- this option, too, will be gone.

[257] In California, for example, child care costs for families of all income levels average $200-$250 per month per child. Conversation with Carol Stevenson, Bay Area Child Care Proj., Dec., 1981.

[258] In many states AFDC recipients were receiving child care that cost more than $160 per child, per month through the use of Title XX subsidies rather than the AFDC disregard. These recipients, too, face a potential loss of child care if, because of Title XX costs, their only option for financing child care is the AFDC disregard. See discussion supra Section III.

> Joan Smith, an AFDC recipient, has used the Good Earth Child Care Center to care for her two children. This care costs $350 per month. Ms. Smith has not been paying for this care because her children occupied program slots that were funded by the state under the Title XX program. Due to federal cutbacks, there are fewer funded slots available, and AFDC recipients are being forced to rely on the AFDC child care expense disregard rather than exclusively on Title XX to finance their child care. In order to enable Joan Smith's children to continue at the Good Earth Child Care Center, she would have to pay $320 for the two children ($160 per child). This amount would be deducted from her earned income as a result of the child care expense disregard, and then the state would pay the additional $30 under the Social Services Block Grant Program.[260]

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[259] This approach is being followed in Colorado. See discussion supra Section III. Colorado's basis for adopting this approach shows the importance of researching state law in arguing for this and other approaches to child care issues. The decision to provide this subsidy in Colorado was apparently based on an opinion by the Colorado Attorney General that the state could not legally impose a ceiling on expenditures for child care services to welfare recipients -- which would be the result if recipients were simply relegated to use of the disregard -- when publically-funded child care services to non-recipients were not subject to any ceiling. Conversation with David Ashmore, Director, Colo. Dep't Soc. Servs., Dec., 1981.

[260] Although this approach permits AFDC recipients to obtain child care that costs more than $160 per child, per month, it is otherwise not as beneficial as receiving totally subsidized care under the Title XX Social Services Block Grant Program. Not only does it require recipients to actually pay out a portion of their limited earnings, but because of the way the income disregard is calculated (by subtracting the $30 plus 1/3 of the remainder after the $75 in work expenses and $160 in child care expenses (continued)

b. Maximizing the use of the disregard for part-time workers

Another area in which the impact of the change in the child care expense disregard may be felt differently in different states is in its effect on part-time workers. As noted above, the Secretary has delegated his authority to prescribe any maximum lower than $160 per month, per child for part-time workers or workers who work less than a full month to the states. The result is that each state is now free to set a lower maximum, if any. The option that a state chooses is significant because so many AFDC recipients in the paid labor force work less than full time. In 1977, of the almost 14% of AFDC mothers who were currently employed, more than one third were working part-time.[261]

State responses vary. Massachusetts, for example, has developed a fairly complex scheme which basically allows an individual to disregard $40 of child care costs per month for every ten hours worked per week.[262] Thus, a person working 20 hours per week in Massachusetts is entitled to a monthly child care disregard of $80. In Alabama, on the other hand, state welfare officials have set the ceiling at $120 per month for any person working less than 30 hours a week.[263] In Illinois,

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are subtracted) even during the four months the income disregard is available recipients will have less spendable income than if the Title XX program had paid all of their child care expenses.

[261] AFDC Characteristics, supra note 232, at 44.

[262] 106 C.M.R. §304.270 (1981).

[263] Conversation with Jim Kennedy, Assistant to Director, Ala. (continued)

workers will be entitled to the maximum $160 per month, per child even when working less than full time.[264]

1. Negotiating

A first step in maximizing the amount of the child care expense disregard for part-time workers is to persuade state officials that the $160 maximum should not be lowered for any workers. Several arguments may be available. First, the $160 maximum may represent an inadequate amount for the purchase of child care, even by full-time workers, in that state or locality. Although the state has no authority to raise the $160 amount for full-time workers, it can at least choose not to lower that amount for part-time workers. Second, the child care expenses of part-time workers may, in fact, not be any lower than those of full-time workers. Child care programs may require registration for a full week or month, or a full day, or may charge a set fee regardless of the number of hours that the child is enrolled.[265] Moreover, even if actual child care expenses are lower because a child is enrolled less than full time, they may not be proportionately lower -- a child in a half-day program may pay more than half the full day rate, for example, so that a proportionate reduction in the child care expense disregard

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Bur. Pub. Assist., Dec. 1981.

[264] Conversation with Phil Matmaker, Chief, Bur. Soc. Servs., Ill. Dep't Pub. Aid, Dec. 1981.

[265] Indeed, as funding for child care programs is cut back, see discussion supra Section III, programs may become less flexible in their fee schedules.

simply because the child's parent works half a day may bear no relation to that parent's actual child care expenses.[266]

2. Federal law theories

There seems to be some confusion on the question whether the delegation of authority to the states by the Secretary creates a mandatory obligation to lower the child care maximum for part-time workers or whether states retain the discretion to apply the $160 maximum to all recipients regardless of their employment status. Some states seem to have adopted the latter position.[267] Support for this position can be found in the statute, which provides that the Secretary "may" prescribe lesser amounts (and hence the states should have the same discretion),[268] and in the preamble to the regulations, which provides that "[a]s for work expenses, [s]tates can set limits below $160 for part-time workers."[269] The language of the regulation itself, however, appears obligatory. It states:

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[266] This is more likely to be true when other cost factors are taken into consideration. Depending on how far away from the parent's job or home the child care provider is located, although the parent may work half-time the child may be enrolled for a longer period to account for the parent's travel time to and from the provider. Similarly, although the child may be enrolled for only a half day, whether the child is served breakfast and/or lunch by the provider may affect the cost of care.

[267] *See* discussion *supra* Section IV-B.

[268] Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-351 §2301, 95 Stat. 357.

[269] 47 Fed. Reg. 5662 (Feb. 5, 1982)(emphasis added). In the work expense disregard section, however, stronger language is used. The preamble provides that "... the Secretary has decided to require states to adjust the $75 work expense deduction for those working less than full-time or not working throughout the month." *Id*.

> The [s]tate agency shall have in place a procedure under which it determines and applies a disregarded amount less than $160.[270]

Thus, there is an apparent inconsistency between the words of the the preamble to the regulation on the one hand and the words of the regulation on the other. It remains to be seen whether the Department of Health and Human Services will enforce the regulation to require the establishment by the states of a lower maximum on the disregard for part-time workers.

A related question is whether the Secretary acted improperly in the first instance in delegating his authority to set lower maximums for part-time workers to the states. The argument against the delegation would be that Congress intended that the Secretary determine whether such lower maximums were justified and, if so, to set them. A purpose of the statutory changes in the disregards was to reduce administrative cost and to mandate uniformity among the states -- results that can not be achieved if the states are free to set and administer their own maximums.

In an analagous context, however, the Supreme Court has approved a delegation by the Secretary of Health, Education and Welfare [now Health and Human Services] to the states. In Batterton v. Francis,[271] at issue was the meaning of Section 407 of the Social Security Act,[272] which provided that states could include within their AFDC programs dependent children who have been deprived of parental support or care because "of the unemployment (as determined in accordance with standards prescribed by the Secretary) of [their] fathers...."[273] The Secretary delegated his authority to define unemployment to the states. In upholding this delegation, the Court determined that although the Secretary could not " ... adopt a regulation that bears no relation to any recognized concept of unemployment or that would defeat the purpose of the AFDC-UP program,"[274] the regulation he had adopted was well within his authority. Moreover, the Court reached this conclusion in the face of legislative history of Section 407 which demonstrated that Congress had originally delegated to the states the authority to define unemployment but had withdrawn that delegation in favor of the provision at issue. Thus, any challenge to the Secretary's delegation of the authority to set a maximum on child care expenses for part-time workers to the states may run afoul of *Batterton*.

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[270] Id. at 5677 (to be codified in 45 C.F.R. §233.20(a)(11)(C))(emphasis added). The regulatory language is the same for work expenses. Id. (to be codified in 45 C.F.R. §233.20(a)(11)(B)).

[271] 432 U.S. 416 (1977).

3. State law theories

Finally, if states set arbitrary or unreasonable maximums for part-time workers, state statutes that authorize challenges to state administrative action that is arbitrary or capricious may be helpful. These statutes, too, could provide relief for low-income individuals harmed by such maximums.

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[272] 42 U.S.C. §607 (1974).

[273] *Id*.

[274] 432 U.S. at 428.

C. AFDC Work Programs

1. Introduction

States were given broad discretion under the Omnibus Budget Reconciliation Act of 1981 to develop new work programs for AFDC recipients. These include a Work Incentive ("WIN") Demonstration Program,[275] a Community Work Experience Program ("CWEP")[276] and a Work Supplementation Program ("WSP").[277] Despite differences in the specific approaches, all of these programs grew out of disappointment with the WIN Program and a belief that more AFDC recipients could and should be working.[278]

The Reagan Administration was particularly critical of the failure of the WIN Program to increase the workforce participation of AFDC recipients. In presenting the Administration's position to Congress, Secretary Schweiker explained:

> Under the current WIN program, the majority of employable AFDC recipients do little more than register with WIN.[279]

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[275] Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, §2309, 95 Stat. 357.

[276] *Id*. §2307.

[277] *Id*. §2308.

[278] S. Rep. No. 97-139, 97th Cong., *supra* note 201, at 508.

[279] *Spending Reduction Proposals*, *supra* note 169, at 10.

> The American public is not willing to bear the burden of supporting people who can work. We believe that everyone receiving assistance who is capable of working should be involved in a work program.[280]

Secretary Schweiker then outlined the Administration's proposal to strengthen work requirements in the AFDC program. The central feature of the proposal was the Community Work Experience Program, a mandatory "work relief" or "workfare" program. Simply stated, CWEP would require AFDC recipients to perform work in return for no pay other than their AFDC benefits.[281]

Critics of the President's proposal voiced concern that mandatory work relief, by itself, would do little to break the cycle of dependency fostered by the welfare system. Senator Kennedy, for example, noted that implementation of similar workfare proposals in California made no difference in welfare costs; and in Massachusetts, workfare participants actually stayed on welfare longer than they would otherwise have done.[282] Senator Glenn argued:

> [Workfare] is putting ourselves back at the public feeding trough again -- public jobs. All we are doing is requiring people to go out and rake leaves, pick up cans along the road, and so forth. That is at public expense.[283]

Still others such as Senator Boren and Senator Moynihan expressed concern that CWEP, by itself, failed to address the two major flaws of the WIN Program -- dual agency administration and inflexibility resulting in "cumbersome administrative rules and regulations, high costs, and poor performance."[284]

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[280] Id. at 32.

[281] Id.

[282] See 127 Cong. Rec. S3298 (daily ed. Apr. 2, 1981).

[283] Id.

As a result, Congress rejected the idea of requiring all states to impose workfare requirements on recipients of public assistance in favor of allowing states more flexibility to design and implement work programs to meet the special circumstances of each state. Whether the new programs will increase work participation and decrease welfare dependency is an issue beyond the scope of this paper,[285] which focuses on the impact of the changes in work program requirements on the child care needs of AFDC families.

2. Work Incentive Program (WIN)

a. Introduction

Although Congress was critical of the Work Incentive Program, it remains in effect today with only minor modification.[286] The goal of the WIN Program since its inception in 1967 has been to restore families receiving assistance under the AFDC program to independence and useful roles in the community by providing training and jobs in both the public and private sectors.[287] The program is administered jointly, on the federal level, by the Department of Labor and the Department of Health and Human Services and, on the state level, by state employment services and welfare departments.

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[284] 127 Cong. Rec. S3859 (daily ed. April 10, 1981)(remarks of Senator Boren).

[285] For a review of recent workfare legislation and strategies to address issues raised by workfare, see S. Childs, L. Johnson, K. McKee, A Research Project on Workfare (1982)[hereinafter cited as "Childs, Johnson & McKee"].

[286] One relevant change was to narrow the definition of caretaker under the WIN Program. Prior law simply exempted a mother or other relative who was caring for a child under the age of six. See 42 U.S.C. §602(a)(19)(A)(v)(Cum. Supp. 1975-80). The Budget Act makes the terminology of this exemption gender-neutral and limits its applicability to "the parent or other relative of a child under the age of six who is personally (continued)

Registration for WIN training and job placement is a condition of eligibility for the receipt of AFDC benefits.[288] However, some categories of beneficiaries are exempt from this requirement, including a parent or other relative of a child under the age of six who is caring for the child.[289]

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providing care for the child with only brief and infrequent absences from the child." Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, §2314, 95 Stat. 357. The regulations further requires that the caretaker "personally provide full-time care...." 46 Fed. Reg. 46778 (Sept. 21, 1981) (to be codified at 45 C.F.R. §56.20(b)(8)) (emphasis added). The purpose of this change was to prohibit full-time students with young children from taking advantage of the WIN exemption. According to Secretary Schweiker, " ... allow[ing] able-bodied adults to avoid work and attend school while the taxpayers who are supporting them through welfare may be unable to afford college for themselves or their children" was unjustified. Spending Reduction Proposals, supra note 169, at 33.

[287] See 42 U.S.C. §630.

[288] Id. §602(a)(19)(A), as amended by Omnibus Budget Reconciliation Act, Pub. L. 97-35, §2314, 95 Stat. 357.

[289] Id. §602(a)(19)(A)(v). See note 286 supra. Other categories of individuals exempt from WIN registration include:

> children under the age of sixteen or attending an elementary, secondary or vocational school full time, id. §602(a)(19)(A)(i), as amended by Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, §2314, 95 Stat. 357.
>
> persons who are ill, incapacitated, or of advanced age,

(continued)

Following registration for WIN, an appraisal interview is conducted to determine if the individual is suitable for participation in the program.[290] Then an employability plan is developed for each individual determined to be suitable.[291] The employability plan must contain a "definitive employment goal, attainable in the shortest period of time consistent with the support services needs of the recipient, project resources and job market opportunities in the area."[292]

Importantly, the statute mandates that the state must provide social and supportive services necessary to enable an individual who is an AFDC recipient to accept employment and training through WIN.[293] Indeed, it is only after the state has

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> *id*. §602(a)(19)(A)(ii);
>
> persons so remote from a WIN project that their effective participation is precluded, *id*. §602(a)(19)(A)(iii);
>
> persons whose presence in the home is required because of illness or incapacity of another household member, *id*. §602(a)(19)(A)(iv);
>
> mothers or other female caretakers of children, if a non-exempt adult male relative is in the home, *id*. §602(a)(19)(A)(vi);
>
> persons working more than thirty hours per week, *id*. §602(a)(19)(A)((vii).

Mothers with children under the age of six have been permitted to register voluntarily. *Id*. §602(a)(19)(A).

[290] 45 C.F.R. §224.22 (1981).

[291] 42 U.S.C. §633.

[292] 45 C.F.R. §224.22(d)(1981).

[293] 42 U.S.C. §602(a)(19)(G). *See also* 45 C.F.R. §224.30(1981).

affirmed in writing that all necessary, immediate and on-going supportive services have been provided or arranged that an individual is "certified" ready for placement in an appropriate work assignment.[294]

Child care is specifically included as a supportive service that must be available or provided to individuals enrolled in the WIN program.[295] The statute also provides that "when more than one kind of child care is available, the mother may choose the type, but she may not refuse to accept child care services if they are available."[296] Finally, child care services provided under the WIN Program are required to meet the standards for Title XX child care.[297]

An important part of the WIN Program are the sanctions for failure to participate in the program and the process by which those sanctions are applied.[298] The statute provides that an individual who refuses to register or participate in WIN will have his or her needs excluded in determining the family's eligibility for, and level of, AFDC benefits.[299] The state welfare agency is required to provide AFDC recipients an opportunity for a hearing in the case of disputed registration determinations under the WIN Program.[300] In addition, the state employment service must provide recipients with an opportunity for a hearing if an individual refuses to accept employment, or has other complaints arising subsequent to registration.[301]

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[294] Id. §224.22(e)(1981).

[295] 42 U.S.C. §602(a)(19)(G)(ii); 45 C.F.R. §224.30(c)(1)(1981).

[296] 42 U.S.C. §602(a)(19)(G)(iv). Earlier WIN regulations had included a provision that such care must be suitable for the individual child. 45 C.F.R. §1392.18 (1975).

[297] Id. §224.30(c)(1)(1981). The federal day care standards were repealed with the passage of the Social Services Block Grant Program. See 47 Fed. Reg. 7668 (Feb. 22, 1982) and discussion supra Section III.

[298] See 42 U.S.C. §602(a)(19)(F); 45 C.F.R. §§224.50, 224.51 (1981).

b. Statutory changes

A significant change in the WIN Program is the new statutory option that permits a state to replace its WIN program for three years with a WIN demonstration program.[302] Although the basic eligibility standards of the WIN Program apply to the new demonstration program,[303] states are given wide latitude in devising their plans so long as a few specified requirements are met.

States desiring to implement WIN demonstration programs must submit a letter of application accompanied by a state program plan to the Department of Health and Human Services sixty days following enactment of the Omnibus Budget Reconciliation

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[299] 42 U.S.C. §602(a)(19)(F).

[300] 45 C.F.R. §224.60 (1981).

[301] *Id*. §224.65.

[302] Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, §2309, 95 Stat. 357.

[303] *Id*.

Act.[304] Because a purpose of the WIN Demonstration Program is to "...demonstrat[e] single agency administration of the work-related objectives of [the Budget] Act...,"[305] any plan submitted must assure that administration and supervision of the program will be the responsibility of a single state agency, which in turn must be the welfare department.[306] The statute further requires that each state plan contain the following basic elements:

-- a statement that all persons eligible for or receiving assistance under the AFDC Program shall be required to participate in the demonstration program, subject to the same criteria for participation as are in effect under the WIN Program during the month before the demonstration program commences;

-- a statement that the criteria for participation in the demonstration program must be uniform throughout the state, but other components of the program may vary within the state;

-- a statement of the objectives of the demonstration program, with emphasis on the ways in which the state expects to maximize client placement in private-sector nonsubsidized employment;

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[304] Id. Applications were due by October 13, 1981.

[305] Id.

[306] Id.

-- a statement of the methods used to achieve the above objectives, which may include but are not limited to, "maximum periods of participation, job training, job-find clubs, grant diversion to either public or private sector employers, services contracts with [s]tate employment services, prime sponsors under the Comprehensive Employment and Training Act of 1973, or private placement agencies, targeted jobs tax credit outreach campaigns, and performance-based placement incentives";

-- a statement of the format and frequency of reporting of information on the operation of the program.[307]

A state's application to establish a demonstration program "shall be deemed approved" unless the Secretary notifies the state in writing of disapproval within forty-five days, at which time the state must be provided with an opportunity to resubmit the plan.[308]

A WIN demonstration program must run for a period of three years, during which time the Department of Health and Human Services is required to conduct two evaluations of the program.[309] The state may elect to use up to six months of the three years for planning purposes, during which time all of the existing WIN requirements will remain in effect.[310] Federal funds available to administer and operate the demonstration program are to be proportionate to the state's initial annual 1981 allotment (based on the actual appropriation for Fiscal Year 1981) under the WIN Program, plus any other federal funds that a state is eligible to receive under other statutes for establishing work programs for AFDC recipients.[311]

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[307] Id.

[308] Id.

[309] Id. See also U.S. Dep't of Health & Human Servs., AFDC Action Transmittal No. SSA-AT-81-29 6 (1981)[hereinafter cited as (continued)

The statute further provides that earnings derived from participation in a WIN demonstration program may not result in financial ineligibility for AFDC benefits.[312] The Department of Health and Human Services has interpreted this provision to mean that individuals participating in the program are subject to the regular earned income disregards, but will continue to be eligible for Medicaid during their participation in the program.[313]

"AFDC Action Transmittal"].

[310] Id. at 3.

[311] Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, §2309, 95 Stat. 357. It should be noted that the Reagan Administration has proposed zero funding for the WIN Program in Fiscal Year 1983. President's 1983 Budget, supra note 59, at 5-121. In lieu of WIN, the Administration has proposed that adoption by the states of the Community Work Experience Program be made mandatory. Id. Advocates working on WIN and WIN Demonstration Program issues, including child care, should closely follow the progress of the Administration's budget proposals through Congress this year.

[312] Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, §2309, 95 Stat. 357.

[313] AFDC Action Transmittal, supra note 309, at 8.

Other than meeting these specific requirements,[314] the statute provides that "a [s]tate shall be free to design a program which best addresses its individual needs, makes best use of its available resources, and recognizes its labor market conditions."[315]

c. Impact of statutory changes and strategies

With the passage of the Omnibus Budget Reconciliation Act of 1981, the preeminent position of federal law with respect to state work programs for AFDC recipients has been substantially weakened.[316] The statute expressly provides that in those states that choose to implement WIN demonstration programs, the demonstration program is to serve as an alternative to the WIN program.[317] Moreover, fewer specific requirements are imposed on states deciding to develop and implement WIN demonstration programs than are imposed under WIN.

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[314] The requirements for WIN demonstration programs are subject to waiver by the Secretary under Section 1115 of the Social Security Act, 42 U.S.C. §1315, to the same extent as the other requirements of the Social Security Act are subject to waiver.

[315] Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, §2309, 95 Stat. 357.

[316] Before the Act, states were free to add to the requirements of the WIN program only so long as their added requirements were not in direct conflict with the WIN requirements. *See New York Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405 (1973). *See also Woolfolk v. Brown*, 538 F.2d 598 (4th Cir. 1976); *Stanton v. Price*, 383 N.E.2d 1091 (Ind. 1978); *Fitch v. Public Welfare Div.*, 557 P.2d 253 (Or. 1976). For example, in *Stanton v. Price*, the caretaker of a child under six years of age challenged provisions of Indiana's welfare regulations requiring that she accept training or employment as a condition of AFDC eligibility. The court held the state law provision invalid on the grounds that it directly conflicted with the federal statute's exemption of caretaker relatives of children under the age of six.

[317] Omnibus Budget Reconciliation Act, Pub. L. 97-35, §2309, 95 Stat. 357. In those states that choose not to establish a WIN (continued)

Among the various new work program options provided to the states, the WIN Demonstration Program seems to be the one that most states are planning to implement. As of October 13, 1981, the date states were required to submit applications for the program, twenty-six states had submitted applications.[318] Of these twenty-six, as of February, 1982, the plans of nineteen states have been approved and the plans of seven states have been disapproved, pending receipt of additional information.[319]

The Omnibus Budget Reconciliation Act is silent on the extent to which supportive services, including child care, must be available or provided to participants in a WIN demonstration program. The statute does provide that all persons eligible for

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demonstration program, even if they adopt one of the other new work programs, registration in the WIN program will still be required of recipients and the WIN program will continue to operate. Id.

[318] States which have submitted applications for the WIN Demonstration Program include:

Alabama
Arizona
Arkansas
Delaware
Florida
Illinois
Indiana
Kentucky
Maine
Maryland
Massachusetts
Michigan
Mississippi
Nebraska
New Jersey
Oklahoma
Oregon
Pennsylvania
Rhode Island
South Dakota
Tennessee
Texas
Vermont
Virginia
West Virginia
Wisconsin

Mailing of Nat'l Employment Law Proj., Nov. 4, 1981, at 5.

[319] The seven states are Arkansas, Illinois, Indiana, New Jersey, Kentucky, Tennessee, Wisconsin. Id. Illinois, Arkansas and New Jersey are planning to reapply; the others have withdrawn their applications. Id.

AFDC shall be required to participate in any WIN demonstration program "subject to the same criteria for participation ... as are in effect under [part C] and part A during the month before the month in which the demonstration program commences."[320] Part C contains the pre-existing and current WIN Program provisions codified at 42 U.S.C. §§630-644; part A contains the AFDC state plan requirements, including the WIN registration requirements, codified at 42 U.S.C. §602. Based on this statutory provision, an argument might be made that "same criteria for participation" encompasses the requirement that states assure that supportive services including child care are available to registrants, because such services are a precondition to participation in WIN under part A of the Act,[321] and included in the required employability plan under part C.[322] However, if the result of this argument is to make all of the requirements of part A and part C applicable to WIN demonstration programs, proponents of the argument may have to contend with the objection that this is inconsistent with the flexibility Congress intended in the WIN Demonstration Program.[323]

Even if the new statute cannot be read to require that child care services be provided or available before participation in a WIN demonstration program can be compelled, states should be urged to include such a requirement as part of their programs. As a first step, advocates in states that have submitted plans to implement WIN demonstration programs should obtain copies of their state's plan from either state welfare officials or the Department of Health and Human Services,[324] in order to ascertain the way in which the plan addresses the child care needs of participants. One problem is that the plan itself, like the federal statute, may simply be silent with respect to child care. If this is the case, or if the child care provisions are inadequate, the next step is to persuade state officials that the WIN demonstration program should not be implemented until adequate child care provisions are included as part of the plan. Such efforts could include presentation of data on the need for adequate child care for recipients of AFDC and the consequences to recipients of a failure to meet that need.

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[320] Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, §2309, 95 Stat. 357. (emphasis added).

[321] See 42 U.S.C. §602(a)(19)(G).

[322] See id. §633; 45 C.F.R. §224.22(d)(1981).

[323] See Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, §2309, 95 Stat. 357. The Department of Health and Human Services, in listing the requirements of a state plan for a WIN demonstration program, refers to "the criteria for participation (which includes exemptions and sanctions)..." without further explanation of the phrase. See AFDC Action Transmittal, supra note 309, at 2.

One review of the state plans submitted to HHS by states seeking to operate WIN demonstration programs found that few of the plans refer specifically to child care.[325] Of the state plans discussed, only Oklahoma's and Pennsylvania's plans make specific reference to child care services for program participants.[326] The Oklahoma plan refers in part to the planned use of Title XX funds; the Pennsylvania plan suggests that until a recipient has obtained child care the recipient will not be certified as "job-ready".[327] Another informal survey of the states revealed, however, that most states say they will provide child care to program participants out of Title XX funds or through use of the child care expense disregard.[328]

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[324] Because states were required to submit such plans to HHS by October 13, 1981, it is at this date too late to have input on the content of the plan as submitted. However, because states are permitted a planning period of up to six months, id. at 3, there is still opportunity to influence the implementation of the program.

[325] Nat'l Employment Law Proj., Survey of State WIN Demonstration Applications 8 (1982)[hereinafter cited as "NELP Survey"].

In a state that implements a WIN demonstration program without provision for the child care needs of participants, state law should be examined for ways in which that implementation could be forestalled entirely, or with respect to particular individuals in need of child care. For example, state and local child welfare laws that delineate not only a parent's but also the state's responsibility to ensure that children are not neglected may be helpful. In many instances, the primary responsibility for the enforcement of such laws falls upon the head of the state's welfare agency -- the same individual who, in many instances, will oversee implementation of the WIN demonstration program. Thus any work program that fails to consider the child care needs of recipients may conflict with the state's responsibility to ensure that children are not neglected.

In a state that implements a WIN demonstration program with a provision for child care, but an indequate provision, other state law arguments may be available. Over the years, state regulation of child care providers has increased dramatically. As of 1978, all states and the District of Columbia had laws licensing center-based day care providers, and forty-four states and the District of Columbia had laws regulating family day care providers.[329] The laws generally specify environmental standards, child/staff ratios, program requirements and/or staff qualifications that must be met by such providers.[330] A WIN demonstration program that provides for the referral of AFDC recipients to child care providers who do not meet these specifications, or otherwise insists that recipients utilize such providers for child care, may be in violation of state law.[331]

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[326] Id.

[327] Id.

[328] F. Kramer, Analysis of State WIN Demonstration Plans (1982) (unpublished paper).

3. Community Work Experience Program (CWEP)

a. Introduction

Since 1968 federal law has prohibited states from implementing programs requiring AFDC recipients to work for no pay other than their AFDC grants.[332] However, several states have implemented similar programs for their general assistance recipients,[333] and at least one state, Utah, has obtained a waiver pursuant to Section 1115 of the Social Security Act[334] to implement such a program for AFDC recipients.[335] At the urging of the Reagan Administration, Congress included in the Omnibus Budget Reconciliation Act a provision permitting states to implement work relief programs for recipients of AFDC.[336]

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[329] *See generally* Laurence Johnson & Assocs., Inc., *supra* note 216.

[330] *Id*.

[331] A state that establishes such a program may also be exposing itself to potential liability in tort, if children or others are injured while receiving care from such a provider -- a factor that should be pointed out to states contemplating such programs.

[332] 42 U.S.C. §609 (1974).

b. Statutory changes

The purpose of the Community Work Experience Program, as set forth in the statute, is "to provide experience and training for individuals not otherwise able to obtain employment, in order to assist them to move into regular employment."[337] Basically, in those states choosing to establish CWEP, all recipients of AFDC who are required to register under the WIN Program may be required to work, on a monthly basis, up to a maximum number of hours equal to the amount of AFDC that the family is entitled to receive divided by the greater of the applicable federal or state minimum wage.[338] The assistance paid is not to be considered "compensation for work performed" under the program.[339] The statute permits states to require the participation of otherwise exempt parents or relatives of children under the age of six "but only if the child for whom the parent or relative is caring is not under the age of three and child care is available for such child...."[340] The statute provides for coordination between CWEP and WIN, and explicitly states that "job placement will have priority over participation in [CWEP]...."[341] Failure to participate in CWEP results in the application of sanctions in the same manner as sanctions are imposed under the WIN Program, under the same hearing procedures.[342]

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[333] These states include Arkansas, Maine, Maryland, Missouri, New York, South Carolina, Utah and Washington. See Childs, Johnson & McKee, supra note 285, at 18.

[334] 42 U.S.C. §1315.

[335] See Nation Has Tried Many Work-Welfare Programs in Past, Jobs Watch 30 (Sept.-Oct. 1981).

[336] Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, §2307, 95 Stat. 357.

[337] Id.

The statute specifically limits community work experience projects to those "which serve a useful public purpose in fields such as health, social service, environmental protection ... and day care."[343] The law further provides that "[t]o the extent possible, the prior training, experience, and skills of a recipient shall be utilized in making appropriate work experience assignments."[344] Any program must also provide:

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[338] Id.

[339] Id.

[340] Id.

[341] Id.

[342] Id.

[343] Id.

[344] Id.

- that appropriate health and safety standards, and other conditions applicable to the performance of work, are met;[345]
- that the program does not result in the displacement of persons currently employed;[346]
- that reasonable conditions of work, taking into account the geographic region, residence and the proficiency of the participants, are met;[347]
- that participants will not be required to travel an unreasonable distance from their homes without their consent;[348] and
- that provision will be made for transportation and other costs which are reasonably necessary and directly related to participation in the program, not in excess of an amount established by the Secretary of Health and Human Services.[349]

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[345] Id.

[346] Id.

[347] Id.

[348] Id.

[349] Id. The Secretary has limited federal reimbursement for these costs to $25 per month. The pertinent regulation provides:

> States must provide reimbursement for transportation and other costs that the state determines are necessary and directly related to participation in CWEP incurred

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States wanting to establish CWEP must do so at state expense, but federal matching funds are available for most administrative costs.[350] Administrative costs that are excluded from federal matching include the cost of materials or equipment, as well as the cost of supervision of work under CWEP.[351]

Unlike under WIN, the statute does not explicitly require states to provide counseling or supportive services to CWEP participants. Moreover, unlike under both WIN and the WIN Demonstration Program, states are expressly permitted to require participation in CWEP of caretakers of preschool-age children.

c. Impact of statutory changes and strategies

As of January, 1982 a few states, including Massachusetts, New York, Oregon and West Virginia, had expressed interest in establishing a community work experience program.[352] Several other states, including Maryland, Oklahoma, South Dakota and West Virginia, are seeking to include a CWEP component in their WIN Demonstration Programs.[353] Moreover, for Fiscal Year 1983, the

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> by the participant. For [federal financial participation] purposes, this amount shall not exceed $25 per month, per participant.

47 Fed. Reg. 5684 (Feb. 5, 1982), (to be codified in 45 C.F.R. §238.16(b)).

[350] Id. (to be codified in 45 C.F.R. §238.60).

[351] Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, §2307, 95 Stat. 357.

[352] Mailing of Nat'l Employment Law Proj., Feb. 18, 1982, at 14.

[353] NELP Survey, *supra* note 325, at 5.

Reagan Administration has proposed that CWEP be made mandatory for all states.[354] Thus, issues under the current program, including child care, could become important in even more states at a later time.[355]

In response to concerns about the potential strain on the already over-burdened child care delivery system[356] that CWEP might create, Secretary Schweiker suggested that the need for day care be alleviated by the development of CWEP projects in which CWEP participants would care for the children of other AFDC recipients who are working or participating in CWEP.[357] In the preamble to the regulations implementing CWEP, the Secretary again advised the creation of CWEP day care projects to meet the child care needs of participants.[358]

Thus it is possible that a state desiring to operate a community work experience program that includes parents or other caretakers of children over the age of three, or even over the age of six, may establish CWEP child care projects to serve other CWEP participants. This possibility raises two child care issues. The first is the extent to which an AFDC caretaker may refuse to participate in CWEP because child care is either not available or is not adequate.[359] The second is the extent to which an AFDC recipient may refuse to accept a CWEP assignment as a child care provider.

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[354] President's 1983 Budget, supra note 59, at 5-157.

[355] An analysis of issues raised by CWEP other than those relating to child care is beyond the scope of this paper. But see Childs, Johnson & McKee, supra note 285.

[356] See discussion supra Section I.

[357] See Spending Reduction Proposals, supra note 169, at 9.

[358] See 47 Fed. Reg. 5648, 5659 (Feb. 5, 1982).

1. Refusing a CWEP assignment for lack of child care services

a. When there is no child care

First, no one should be required to participate in CWEP if, as a result of such participation, children are left unsupervised or improperly supervised. There is support for this position in the statute, which expressly provides that an AFDC recipient with a child between the ages of three and six must have available child care before participation in the program may be required.[360] Whether child care must be available before caretakers of children age six and over can be required to participate, however, is not expressly addressed in the federal law. Here, as under the WIN Demonstration Program, advocates will have to muster general common sense arguments that children cannot be left without care, to persuade state officials to include provision for the child care needs of caretakers of school-age children in their CWEP plans. If these efforts are unsuccessful, resort to state and local child neglect laws[361] may be useful to ensure that recipients are not required to participate unless child care is provided or available

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[359] Although this issue is discussed here in the context of a potential referral to a CWEP child care project, it obviously is a broader issue that may arise in the context of a referral to any other CWEP work assignment as well.

[360] Omnibus Budget Reconciliation Act, Pub. L. 97-35, §2307, 95 Stat. 357.

b. When child care is inadequate

On the question of the adequacy of child care, regulations promulgated by the Secretary of the Department of Health and Human Services make clear that some qualitative assessment of the child care provided for CWEP participants must be made. The regulations themselves expressly require "appropriate" child care;[362] the language of the preamble to the regulations refers to "adequate" care.[363] In addition, the preamble states that it is implied in the regulations that "any existing federal, state and local laws relating to CWEP must be recognized," and specifically refers to child care laws as an example.[364]

As described earlier,[365] all states have established health and safety standards for day care centers and most states regulate family day care homes as well.[366] These state standards may be relied upon to give content to the adequacy requirement in the federal regulations for child care for caretakers of children between the ages of three and six. They may also be relied upon to argue that child care provided or available for caretakers of children of all ages must comply with state law before participation in CWEP can be required.

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[361] *See* discussion *supra* Subsection 2-c.

[362] 47 Fed. Reg. 5648, 5683 (Feb. 5, 1982), (to be codified in 45 C.F.R. §238.14(b)(2)).

[363] *Id.* at 5658.

[364] *Id.* at 5660.

[365] *See* discussion *supra* Subsection 2-c.

[366] *See id.*

c. When child care is inappropriate

Whereas the requirement of "adequacy" raises issues of whether applicable health and safety standards are met, the requirement of "appropriateness" raises issues of whether the kind of care and/or the provider is "right" for a particular child. The regulations and the preamble to the regulations, in their use of both these terms, seem to recognize that both adequacy and appropriateness are to be considered in evaluating the child care provided or available to potential CWEP participants. Advocates may be able to rely on this language to try to argue for some consideration of the individual needs of participants and their children in evaluating care.367/

Questions of the adequacy and appropriateness of child care may be more of an issue when recipients are referred to CWEP

367/ Both adequacy and appropriateness issues have long been a part of the evaluation of child care needs under the WIN Program. As to adequacy, the WIN Program requires that child care facilities meet applicable state and local laws and, in some instances, federal requirements. 45 C.F.R. §224.30 (1981). As to appropriateness, the WIN Program in the past required that care be "suitable" for the individual child. 45 C.F.R. §1392.18 (1981). Although this requirement no longer exists in the WIN Program, an argument could be made that it should be included in CWEP, on the grounds that the needs of individual children must be evaluated in greater degree when they are under the age of six, a factor recognized by the Secretary in his use of the term "appropriate."

child care projects than when they are referred to other providers. Due to the paucity of information available at this time, it is difficult to predict how many states will actually set up such projects or what forms they will take. However, because the statute prohibits federal matching funds for the costs of materials, equipment and supervision,[368] financially-strapped states may have difficulty in establishing CWEP child care projects that are able to provide care that is both adequate and appropriate for the needs of the children enrolled.

d. Financing adequate and appropriate child care

The financing of child care will be even more of an issue under CWEP than it is under current law, and this, too, affects the availability of that care, as well as its quality. The money received as a result of a CWEP job is the individual's AFDC grant, and not to be considered "compensation for work performed" under the program.[369] Therefore, participants are not eligible for the child care expense disregard or any other AFDC earned income disregard. Instead, the statute requires provision for costs "reasonably necessary and directly related to participation in the program," but "not in excess of an amount established by the Secretary [of the Department of Health and Human Services]."[370] Rather than directly setting a ceiling on the amount of these costs that will be recognized, the regulations require the state plan to specify "the amount and types of participation costs the [s]tate will reimburse to recipients."[371] Under this requirement, states are prohibited from requiring that participants use "their assistance or their income or resources to pay for participation costs",[372] and must reimburse "transportation and other costs" incurred by participants which the state "determines are necessary and directly related" to CWEP participation.[373] However, only up to $25 per month per recipient will be eligible for federal matching funds.[374]

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[368] Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, §2307, 95 Stat. 357.

[369] *Id.*

[370] *Id.* §2308.

The limit on the amount of expenses that the federal government will match does not affect the state's obligation to reimburse CWEP participants for their full costs, as the Secretary has made clear in the regulations.[375] However, it does increase the likelihood that states will be restrictive in determining the costs that are necessary and related to participation in the program,[376] or will otherwise attempt to limit claims for reimbursement of expenses.[377]

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[371] 47 Fed. Reg. 5683 (Feb. 5, 1982) (to be codified in 45 C.F.R. §238.16).

[372] *Id.* at 5682 (to be codified in 45 C.F.R. §238.16(a)).

[373] *Id.* at 5683 (to be codified in 45 C.F.R. §238.16(b)).

[374] *Id.*

[375] 47 Fed. Reg. 5659 (Feb. 5, 1982). The Secretary did, in addition, indicate an intention to monitor the $25 limitation closely to determine if future revisions are warranted. *Id.*

[376] The absurdity of the $25 ceiling is evident when this amount is compared with the statutory work expense disregards for recipients other than CWEP participants of $160 per month, per (continued)

2. Refusing a CWEP assignment as a child care provider

The second major child care issue under CWEP involves the possibility that states will require AFDC recipients to become child care providers. Although the issue of when and under what circumstances recipients may refuse work assignments is generally beyond the scope of this paper, a recipient who does not want to become a child care provider can find support in the CWEP provisions, under certain circumstances. First, the prior training, experience and skills of a recipient are to be utilized in making appropriate work assignments.[378] Second, the proficiency of the recipient is to be a part of the evaluation of whether reasonable conditions of work are being met in the offered assignment.[379] Finally, appropriate health and safety standards, as well as "other conditions applicable to the performance of work," must be met.[380] Although the meaning of

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child care and $75 per month for all other work expenses. Unless a state can demonstrate that the work expenses attributable to CWEP participation are, for some reason, significantly lower, these amounts, at a minimum, should be applicable to CWEP as well.

[377] The Secretary has suggested that states could limit their costs for reimbursement of expenses by limiting the number of participants in the program and the amount of their participation, or by providing child care as an in-kind service. Id.

[378] Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, §2307, 95 Stat. 357.

[379] Id.

[380] Id.

these requirements, by themselves, may not easily be ascertainable,[381] when they are read with state law standards for child care providers, they could provide support for an argument that a particular assignment as a provider, for a particular recipient, is inappropriate. For example, although a recipient, simply because she is a mother, may in the state welfare department's view have the requisite skills to become a day care provider, state law may require more training of such providers. Similarly, the home into which a recipient may be asked to take one or more children to provide day care may not meet the health and safety conditions required of the homes of child care providers under state law. Thus, although the purpose of state law standards is to ensure adequate care for children,[382] it may be possible to read these standards together with the above requirements designed to protect CWEP participants, to enable those recipients who desire to do so to refuse an assignment as a child care provider.[383]

4. Work Supplementation Program (WSP)

a. Statutory changes

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[381] In this regard, the interpretation of the similar provisions under WIN or state work programs for general assistance recipients should be researched.

[382] Indeed, as noted earlier, there may be liability in tort if children are injured in an unsafe home. *See* note 331 *supra*.

[383] Of course, federal civil rights laws may also provide a remedy if there is discrimination in the assignments. *See* note 217 *supra*.

The Work Supplementation Program authorizes states to offer jobs in place of benefits to individuals eligible for or receiving AFDC.[384] States are given broad discretion to lower the AFDC standard of need and level of benefits, either uniformly or for certain categories of recipients,[385] to reduce or eliminate the amount of earned income to be disregarded,[386] and to determine eligibility for participation, without regard to existing criteria or exemptions.[387]

States may use the monies saved to provide jobs directly to participants or to subsidize jobs provided by other employers. Participation is limited to jobs in public agencies, public or nonprofit organizations, or proprietary child care facilities.[388] Moreover, the statute specifically states that nothing in its provisions shall be construed as conferring employee status on an individual participating in a "supplemented" job in a public agency, or on an individual participating in a "supplemented" job in other entities during the first thirteen weeks.[389]

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[384] Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, §2308, 95 Stat. 357, 848.

[385] Id.

[386] Id.

[387] Id. See also S. Rep. No. 97-139, supra note 201, at 510.

[388] Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, §2308, 95 Stat. 357. Indeed, work with child care providers is the only for-profit activity to which participants may be referred under this program. Id.

[389] Id.

Although participation in the program by recipients is "voluntary,"[390] depending upon the amount by which and the manner in which AFDC benefits have been reduced in order to establish the program, its "voluntary" nature is questionable. In addition, participation in WSP does not excuse a recipient from the requirements of the WIN Program or CWEP.[391] Unlike CWEP, however, the statute provides that wages earned in a supplemented job are considered earned income,[392] and therefore are subject to the earned income disregards.

The federal funding of work supplementation projects is limited by law to the amount of federal funds available to a state for its AFDC program in May 1981 as modified by mandatory federal law provisions enacted since that date.[393] Thus no new federal money is provided to develop this program. The funds must come from savings attributable to the reduction of AFDC benefits. The Department will adjust the amount available, however, if the number of recipients increases and/or demographic changes occur.[394]

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[390] Id.

[391] Id.

[392] Id. This provision means that recipients should be eligible for the dependent care tax credit if they incur employment-related child care expenses. See discussion supra Section II.

[393] Id.

[394] 47 Fed. Reg. 5651 (Feb. 5, 1982).

b. Strategies

No state, as of February 1982, had indicated an intention to implement the Work Supplementation Program. Thus at this point any discussion of strategies specific to this program is difficult to formulate because no evidence is available as to the way in which a state might operate such a program. Nonetheless, some of the strategies discussed in the sections on the WIN Demonstration Program and CWEP might be applicable. For example, because there are no statutory or regulatory requirements that states implementing work supplementation programs assure that child care is available to eligible participants, an attempt could be made to persuade officials to include such requirements in the state plan, by arguments similar to those suggested under the WIN Demonstration and Community Work Experience programs earlier. For example, both the argument that states must provide for the supervision of recipients' children under their general neglect laws and the argument that any child care provided must be adequate under state and local law could be used in this program.

V. CONCLUSION

Changes in the Internal Revenue Code, the Title XX Social Services Program, and the Aid to Families with Dependent Children Program have all affected the availability of child care for low-income families. An examination of these changes, however, reveals strategies that can be pursued by and on behalf of such families to maximize the child care resources upon which they can draw. These strategies should be vigorously pursued.